Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

NATIONSBANK OF TEXAS, N.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE 1: Retroactivity Turned the Estate Tax into a Direct Tax, in Violation of the Apportionment Clause of the Constitution.

ISSUE 2: The Retroactive Tax Increase is an Attempt to Override the President's Absolute Veto, and Therefore Violates the Separation of Powers Doctrine of the Constitution.

ISSUE 3: The Retroactive Tax Increase Violates the Ex Post Facto Clause of the Constitution.

ISSUE 4: The Retroactive Tax Increase Violates the Takings Clause of the Constitution.

ISSUE 5: The Retroactive Tax Increase Violates the Due Process Clause of the Constitution.

ISSUE 6: The Retroactive Tax Increase Violates Equal Protection Guarantees of the Constitution.

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OPINIONS BELOW

Nature of the case. Plaintiff NationsBank, as Independent Executor of the Estate of Ellen Clayton Garwood, Deceased, sued the United States for a refund of estate taxes paid pursuant to a rate increase imposed retroactively by the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 107 Stat. 312 (1993), on the ground that the rate increase was unconstitutional because it was retroactive.

Course of Proceedings. NationsBank sought summary judgment that the retroactive tax rate increase was unconstitutional. The government filed a cross-motion for summary judgment, seeking a declaration that the rate increase was constitutional.

Disposition Below. The United States Court of Federal Claims, Damich, J., granted summary judgment in favor of the government and denied summary judgment for NationsBank, thus upholding the constitutionality of the retroactive rate increase. On October 3, 2001, the United States Court of Appeals for the Federal Circuit affirmed the decision of the United States Court of Federal Claims. On January 29, 2002, the United States Court of Appeals for the Federal Circuit denied NationsBank's petition for panel rehearing and for rehearing en banc.

Opinions Below. The trial court's opinion, is included in its original form in the Appendix. (App. 19). The opinions of the United States Court of Appeals for the Federal Circuit affirming the decision of the Court of Federal Claims and denying NationsBank's petition for

panel rehearing and rehearing en banc are also included in the Appendix to this Petition. (App. 2); (App. 36).

JURISDICTIONAL STATEMENT

The United States Court of Federal Claims had jurisdiction over this case under 28 U.S.C. § 1491 because it is a claim against the United States founded upon the Constitution, and under 28 U.S.C. § 1346(a)(1) because this is an action for recovery of an internal revenue tax erroneously and illegally assessed and collected.

The United States Court of Appeals for the Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(3) because the case was an appeal from a final decision of the United States Court of Federal Claims.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254, because this is a petition for writ of certiorari from an opinion of the United States Court of Appeals for the Federal Circuit affirming a decision of the United States Court of Federal Claims. This petition is timely because the order denying NationsBank's petition for panel rehearing and rehearing en banc was issued by the United States Court of Appeals for the Federal Circuit on January 29, 2002. (App. 36). This appeal is from a final judgment that disposes of all parties' claims.

PROVISIONS OF LAW AT ISSUE

The Constitution of the United States of America, Art. I, §§ 2, 7 and 9; Amends. V and XIV.

The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

STATEMENT OF THE CASE

This case involves the constitutionality of a retroactive increase in estate tax rates. The Economic Recovery Tax Act of 1981 set forth a schedule by which the maximum estate tax rates would be reduced from the then current rate of seventy percent down to fifty percent over a period of four years. In 1984 and again in 1987, Congress extended the fifty-five percent rate. Under the 1987 extension, the fifty-five percent rate was to continue until January 1, 1993. In late 1992 Congress passed legislation to extend the fifty-five percent rate again, but failed to present it to President George Bush within ten days of adjournment. The President pocket vetoed the legislation, and the highest rate reverted back to fifty percent.

Ellen Clayton Garwood died on March 20, 1993. The applicable estate tax rate at the time of her death was fifty percent. On August 10, 1993, however, President Clinton signed the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), permanently increasing the highest estate tax rate to fifty-five percent, and applying the increased rate retroactively to the estates of decedents who died on or after January 1, 1993.

On December 20, 1993, NationsBank of Texas, N.A. ("NationsBank"), acting as Independent Executor of the Estate of Ellen Clayton Garwood, filed a federal estate tax return and paid estate tax at the rate of fifty percent. The Internal Revenue Service then sought to collect an additional five percent in tax from NationsBank, which it paid under protest. NationsBank timely filed a refund claim, which was rejected, and then sued for a refund in the Court of Federal Claims.

REASONS FOR GRANTING WRIT

A. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES COURT OF FEDERAL CLAIMS

ISSUE 1: ***Retroactivity Turned the Estate Tax into a Direct Tax, in Violation of the Apportionment Clause of the Constitution.***

The Apportionment Clause was born out of the colonist's hatred of taxation without representation. It forbids the imposition of a direct tax unless that tax is apportioned among the states according to population in the same manner that representatives are apportioned. Article I, § 2 cl. 3; § 9 cl. 4.

A tax is direct if levied directly upon property, such as an ad valorem tax upon a decedent's estate; it is not direct if it is a tax on the transfer of property from one person to another. *See* ***Fernandez v. Wiener***, 326 U.S. 340, 352, 66 S.Ct. 178, 184-85 (1945). In order to tax estates and

gifts at all, Congress and the courts have had to determine that the estate and gift tax is not imposed upon the property itself, but imposed upon the transfer of interests that occurs at the time of the gift or death. *Id.*; *see* ***Knowlton v. Moore***, 178 U.S. 41, 45-57, 20 S.Ct. 747, 748-50 (1900).

The tax must therefore be in effect at the moment the property rights are transferred or it is a direct tax. Julius H. Amberg, *Retroactive Excise Taxation*, 37 Harv. L. Rev. 691, 694-95 (1924). Thus in every federal estate tax case to come before the Supreme Court, the Court has declared the taxable event to be the moment of death, and the estates were in every case taxed at the rate in effect on the date of death. *See, e.g.*, ***United States v. Manufacturers National Bank***, 363 U.S. 194, 200, 80 S.Ct. 1103, 1107 (1960); ***Fernandez v. Wiener***, 326 U.S. at 355, 66 S.Ct. at 186; ***United States v. Jacobs***, 306 U.S. 363, 59 S.Ct. 551 (1939); ***Tyler v. United States***, 281 U.S. 497, 500, 50 S.Ct. 356, 358 (1930); ***Reniecke v. Northern Trust Co.***, 278 U.S. 339, 343-45, 49 S.Ct. 123, 124-25 (1929); ***Milliken v. United States***, 283 U.S. 15, 22, 51 S.Ct. 324, 327 (1931). It is probably for this reason that, until now, no retroactive rate change has been imposed since the estate and gift tax was enacted in 1916. *See* Michael J. George, *Digging up New Revenue: Retrospective Estate Taxation and the Omnibus Budget Reconciliation Act of 1993*, 96 W. Va. L. Rev. 971, 979 n.39 (1994).

At the time of transfer in the present case, the death of Ellen Clayton Garwood, the applicable estate tax rate was fifty percent. The rate was increased to fifty-five percent only after the transfer had occurred. The increased portion of the tax could not therefore be a tax

on the transfer, but instead must be a direct tax upon the property itself – a violation of the Apportionment Clause.

ISSUE 2: ***The Retroactive Tax Increase is an Attempt to Override the President's Absolute Veto, and Therefore Violates the Separation of Powers Doctrine of the Constitution.***

Article I, § 7, cl. 2 of the Constitution describes the veto and pocket veto process. The President must have ten days after presentment in which to veto a bill. If he does not veto the bill, it becomes law. If Congress adjourns before ten days has elapsed, however, the President may exercise his pocket veto power by refusing to sign the bill. In that case it does not become law.

The pocket veto is the sole absolute veto the President possesses. Unlike the conventional veto, no act of Congress may override it. This distinction is important when viewed in the context of the Framers' experience. The Framers abhorred the notion of the President's having an absolute veto over legislation. *Id.* The King of England had an absolute veto, and he used it frequently. 1 David K. Watson, *The Constitution of the United States,* 355-56 (1910); *see generally* Note, *The Pocket Veto Reconsidered,* 72 Iowa L. Rev. 163 (1986). In fact, the King's use of his absolute veto was the first grievance the colonists levied against him in the Declaration of Independence: "He has refused his assent to laws most wholesome and necessary for the public good." The pocket veto is therefore "an exception to the basic principle that Congress was to have the final word in the enactment of legislation." Edward M. Kennedy, *Congress, The President, and*

the Pocket Veto, 63 Va. L. Rev. 355, 364 (1977); Butler C. Derrick Jr., *Stitching the Hole in the President's Pocket: A Legislative Solution to the Pocket-Veto Controversy*, 31 Harv. J. on Legis. 371, 373-74 (1994).

Giving an absolute power to the executive under any circumstances was a difficult step for the Framers to take. In the end, however, the drafters of the Constitution felt that such power was necessary as a check against the power of Congress. Under Article I, § 7, cl. 2 of the Constitution, if the President does not act on a bill within ten days, it automatically becomes enacted into law, just as if he had signed it. In order to veto the bill, he must return it to the House of Representatives with his objections. Because of the President's pocket veto power, Congress cannot circumvent the President's conventional veto power by presenting a bill to the President and then adjourning during the ten-day period of review. *See* ***Barnes v. Kline***, 759 F.2d 21, 31 (D.C. Cir. 1984), *vacated as moot sub nom.* ***Burke v. Barnes***, 479 U.S. 361, 107 S.Ct. 734 (1987).

The absolute nature of the pocket veto power is therefore a necessary part of the checks and balances that the President and Congress exercise against each other. The President cannot thwart the passage of a bill by simple inaction, and Congress cannot circumvent the President's veto power by presenting a bill to the President and then adjourning before he has time to veto it.

The Constitution permits Congress to re-enact pocket vetoed legislation at a later date and submit it to the President then in office. *See The Pocket Veto Case*, 279 U.S. at 679 n.6, 49 S.Ct. at 466 n.6. The Constitution does not

permit Congress to override the pocket veto, however, and when Congress makes legislation retroactive the absolute veto has effectively been overridden. Thus, to be constitutionally firm, the reborn legislation should operate only prospectively.

In this case, the President chose to affirmatively exercise his pocket veto power. Once he made that decision, Congress had no power to veto it. *See* ***Immigration and Naturalization Service v. Chadha***, 462 U.S. 919, 944-58, 103 S.Ct. 2764, 2780-87 (1983). By enacting OBRA and imposing the fifty-five percent estate tax rate retroactively, however, that is exactly what Congress did. It is immaterial that Congress had the support of the current President when OBRA was passed. If an outgoing President leaves a bill to die a pocket veto death, the incoming President has no authority to approve it, even if the ten days allowed for presidential action have not elapsed. ***Edwards v. United States***, 286 U.S. at 493, 52 S.Ct. at 631. The retroactive imposition of the fifty-five percent estate tax rate was therefore an impermissible override of the President's pocket veto power.

ISSUE 3: ***The Retroactive Tax Increase Violates the Ex Post Facto Clause of the Constitution.***

The United States Constitution prohibits Congress from enacting an ex post facto law: "No Bill of Attainder or Ex Post Facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3.

a. ***Even if the Ex Post Facto Clause Forbids Only Criminal Retroactivity, the Tax Laws Are Criminal in Nature.***

In *Calder v. Bull*, 3 U.S. 386, 390 (1798), the Supreme Court held that the Ex Post Facto Clause prohibits retroactive legislation only in the criminal context. The continuing validity of that case is questionable, but assuming that it is still the law, the Ex Post Facto Clause is nevertheless violated by the retroactive rate increase at issue in this case because the tax laws are so inherently criminal in nature.

Controlling Supreme Court precedent governs this case. The facts are materially indistinguishable from *Burgess v. Salmon*, 97 U.S. 381 (1878). There the government collected a retroactive tobacco tax increase from a manufacturer, Salmon & Hancock. Salmon & Hancock, like NationsBank, paid under protest then sued for recovery of the added tax, contending that the imposition of the retroactive rate increase violated the Ex Post Facto Clause. The government argued that the tax increase was civil, not criminal, so the Ex Post Facto Clause had no application. Holding for the taxpayer, the Court recognized that the criminal and civil sanctions in the tax laws are inseparable: "Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, *and the one was equally authorized with the other*, the proceeding would certainly have fallen within the description of an ex post facto law." 97 U.S. at 384. (Emphasis added.) The prohibition against ex post facto laws, the Court said, "cannot be evaded by giving a civil form to that which is essentially criminal." *Id.* at 385. *Burgess v. Salmon* has never been overruled.

In the Internal Revenue Code, Congress "has created a law enforcement system in which criminal and civil elements are inherently intertwined." ***United States v. La Salle Nat'l Bank***, 437 U.S. 298, 309, 98 S.Ct. 2357, 2363 (1978). The Internal Revenue Code is saturated with criminal penalties. Besides criminalizing a multitude of specific acts, the Code makes it a crime generally to attempt "in any manner to evade or defeat any tax imposed by this title or the payment thereof. . . . " 26 U.S.C. § 7201.

The IRS acknowledges that it is not possible to separate clearly the responsibilities of the Criminal Investigation Division from those of the civil division, "due to the many criminal charges that may be attached to taxpayers' actions involving Examination activities. . . . " *See* IRS Manual § 4565.31 (CCH) Vol. 2 (Audit). When an examiner discovers evidence of fraud, he may refer the case for civil or for criminal fraud investigation. *Id.* § 4565.21(1). If the referral is for civil fraud, however, it is screened by the Criminal Investigation Division, which may reclassify it as criminal. *Id.* § 4565.231.

Conversely, the government touts the advantages of using a civil prosecution "to attack criminal behavior" when the constitutional protections in the criminal process would make prosecution more difficult. *See* Peter Finn & Maria O'Brien Hylton, *U.S. Dept. of Justice, Using Civil Remedies for Criminal Behavior: Rationale, Case Studies and Constitutional Issues* 2-3 (October 1994), cited in Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L. J. 775, 780 n.36 (1997). This practice blurs the lines between the assertedly civil remedies and the criminal prosecution to the point of evanescence. A prosecution is civil when the

government wants it to be civil, and criminal when the government wants it to be criminal. Just as in ***Burgess v. Salmon***, "[t]he one [is] equally authorized with the other . . . " 97 U.S. at 834.

In the present case, the trial court held that the Ex Post Facto Clause was not violated. (App. 32-34); 44 Fed. Cl. at 668-69; *accord*, ***US Bank, N.A. v. United States***, 74 F. Supp.2d 934, 937 (D. Neb. 1999). The increased tax payment was not due until after the passage of OBRA, the court reasoned, so any criminal liability would be for failure to pay the tax after the new law was in effect, and not for any act prior to that date. (App. 34); 44 Fed. Cl. at 668. The court came to that conclusion by ignoring ***Burgess v. Salmon***, where the increased tax payment was likewise not due until after the passage of the new law.

This Court rejected that line of reasoning in ***Weaver v. Graham***, 450 U.S. 24, 28, 101 S.Ct. 960, 964 (1981). There the State of Florida enacted a statute changing the requirements for a prisoner to earn gain time. The new procedure made it more difficult to earn gain time, but it did not take away any time an inmate had already gained under the old statute. Florida, using the same reasoning that the trial court employed in this case, argued that the change in the rules was not retrospective because the new formula would be applied to behavior of prisoners only after the effective date of the act. The Court rejected the argument: "This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical question is whether the law changes the legal consequences of acts completed before its effective date." 450 U.S. at 31, 101 S.Ct. at 965.

The same analysis applies here. If an executor administering the Ellen Clayton Garwood estate had filed an estate tax return three months after decedent's death, fraudulently representing that no tax was due, the tax loss to the government would have been $9,801,716. The additional tax imposed retroactively was $1,320,190, increasing the tax due to $11,121,906. Under the Federal Sentencing Guidelines, this additional tax increases the offense level, and therefore increases the punishment the executor would face by as much as an additional six months in prison. *See U.S. Sentencing Guidelines Manul* §§ 5A ("Sentencing Table"), 2T4.1. Thus, as in ***Weaver v. Graham***, new adverse consequences would arise out of an act that occurred in the past – an impermissible ex post facto result. *See* ***Dobbert v. Florida***, 432 U.S. 282, 292, 97 S.Ct. 2290, 2298 (1977) (increase in punishment after crime committed violates Ex Post Facto Clause).

b. ***The Ex Post Facto Clause Applies to Civil Laws.***

The Ex Post Facto Clause should prohibit retroactive taxation, even if the Internal Revenue Code is viewed as civil in nature, and not penal. There has been substantial criticism of ***Calder v. Bull's*** holding that the Ex Post Facto Clause governs only criminal legislation, and the Supreme Court has recently written as if the case did not exist.

To put ***Calder*** in perspective it is important to realize that the statement in ***Calder*** that only penal laws, and not civil laws, are circumscribed by the Ex Post Facto Clause is dictum. In ***Calder***, a Connecticut probate court had held a will invalid. The Connecticut legislature

subsequently passed a law setting aside the decree of the probate court and granting an out-of-time new trial. The probate court conducted the new trial and reversed itself, holding that the will was entitled to be admitted to probate.

Two questions were brought before this Court: (1) When the original judgment of the probate court became final, the heirs at law were vested with rights of inheritance. Did the legislature, in dissolving that judgment and reopening the case, pass an ex post facto law, and if so, would the law, being civil in nature, be exempt from the operation of the Ex Post Facto Clause? (2) In those days the legislature of Connecticut acted "in a double capacity, as a house of legislation, with undefined authority, and also as a court of judicature in certain exigencies." ***Calder v. Bull***, 3 U.S. at 395; *see* ***Plaut v. Spendthrift Farm***, 514 U.S. at 219, 115 S.Ct. at 1453 (1995). Was the legislature in this case acting in its judicial capacity and merely granting a new trial, which would not implicate the Ex Post Facto Clause?

Four justices decided the case and each wrote an opinion. All of them concurred that the legislature was acting in a judicial capacity. Therefore discussion of the Ex Post Facto Clause was purely dictum. *See* Laura Ricciardi & Michael B. W. Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301, 312-14 (1996).

More importantly, ***Calder*** has been consistently criticized by members of the Supreme Court as well as by commentators. Only thirty years after ***Calder***, and while the ratification of the Constitution was still a relatively fresh event, Justice Johnson delivered a much-quoted assault on the opinion. *See* ***Satterlee v. Matthewson***, 27

U.S. 380, 416 n.a (1829) (concurring op.). He acknowledged that Calder's ex post facto analysis was dictum, "and if adjudged was certainly not sustained by reason of authorities." *Id.* He also predicted that if ***Calder's*** restrictive reading of the Ex Post Facto Clause prevailed it would become a source of difficulty and strained reasoning, and that it would leave "a large class of arbitrary legislative acts without the prohibitions of the constitution." *Id.* at 416.

Justice Johnson has been proven right on several occasions. For example, to avoid manifest injustice the Court has had to hold that a statute requiring an oath of office was a criminal enactment, in order to invoke the Ex Post Facto Clause to invalidate an oath that effectively disqualified Southerners from office after the Civil War, because it required them to swear that they had never spoken, acted nor had sympathies against the United States. *See* ***Cummings v. Missouri***, 71 U.S. 277, 316-18 (1866); ***Ex Parte Garland***, 71 U.S. 333, 334-36 (1867). The Court has had to pretend that a contract existed where none did in order to invalidate a retroactive law under the Contract Clause. *See* ***Steamship Co. v. Joliffe***, 69 U.S. 450 (1864); *see generally* Ricciardi and Sinclair, 27 U. Tol. L. Rev. at 324-328.

It has become increasingly evident that "the distinction drawn so carefully between civil and criminal laws in ***Calder*** and its progeny is essentially vacuous." 27 U. Tol. L. Rev. at 325. Professor Tribe makes the point:

> Certainly the early experience of England with bills of attainder and ex post facto laws had demonstrated the willingness of Parliament to mandate the forfeiture of private estates as a

> penalty of actions which were lawful when committed; and cases such as Cummings and Galvan v. Press evidence the continued resourcefulness of legislative bodies in fashioning civil disabilities which serve "punitive" goals. Thus, if the objective of insuring the legislatures operate only prospectively when the rights of individuals might be adversely affected is to be served in any meaningful sense, the constitutional inhibition of *ex post facto* laws cannot be restricted to penal legislation.

Lawrence H. Tribe, *American Constitutional Law* § 10-2 at 637 n.30 (2d ed. 1988).

Over the last fifty years, the viability of ***Calder's*** ex post facto analysis has come under increasing attack. In 1957, Justices Black and Douglas criticized ***Calder's*** definition of ex post facto laws as too narrow. *See* ***Lehmann v. United States***, 353 U.S. 685, 690-91, 77 S.Ct. 1022, 1025 (1957). In ***Eastern Enterprises v. Apfel***, 118 S.Ct. 2131, 2153 (1998), Justice Thomas wrote that he "would be willing to reconsider Calder and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause." Punitive damages awards are clearly civil remedies, yet the Court has recently said that retroactive authorization of punitive damages would raise serious ex post facto concerns. *See* ***Landgraf v. USI Film Products***, 511 U.S. 244, 281, 114 S.Ct. 1483, 1505 (1994). The Court made no effort to square its statement in ***Landgraf*** with ***Calder***.

This Court should take the opportunity presented in this case to redefine ***Calder's*** place in ex post facto jurisprudence and declare that the retroactive tax increase of

OBRA violates the Ex Post Facto Clause because (1) the prohibition against ex post facto law applies to civil as well as penal legislation, and (2) the structure of the tax code is so penal that it is subject to ex post facto restraints, just as punitive civil damages would be.

ISSUE 4: ***The Retroactive Tax Increase Violates the Takings Clause of the Constitution.***

The Takings Clause of the Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

A "classical taking" occurs whenever the government acquires for itself the property of another. ***United States v. Security Industrial Bank***, 459 U.S. 70, 77, 103 S.Ct. 407, 412 (1982). A tax is not exempt from the constraints of the Takings Clause simply because it is a tax. An act that purports to be a tax runs afoul of the Takings Clause if it is so arbitrary as to amount to confiscation. *See* ***Brushaber v. Union Pacific Railroad Co.***, 240 U.S. 1, 24-25, 36 S.Ct. 236, 244 (1916).

This Court has allowed retroactive taxation on a very limited basis; it has permitted tax retroactivity only for "short and limited periods required by the practicalities of producing national legislation." ***United States v. Darusmont***, 449 U.S. 292, 296, 101 S.Ct. 549, 551-52 (1981). This limited period of retroactivity is permitted in order to prevent taxpayers from evading a tax by taking actions after the introduction of the tax measure and before its passage, such as making gifts just before the enactment of a gift tax. *See* ***Untermyer v. Anderson***, 276 U.S. 440,

450-52, 48 S.Ct. 353, 356-57 (1928) (Justice Brandeis dissenting); *cf.* ***Pension Benefit Guaranty Corp. v. R.A. Gray & Co.***, 467 U.S. 717, 731, 104 S.Ct. 2709, 2718 (1984).

OBRA does not fit those criteria. At the end of 1992, no taxpayer was trying to get a transaction in under the wire in anticipation of a rate increase. To the contrary, the rates were scheduled to be reduced on January 1, 1993, unless Congress acted to freeze them. And although a tax may be made retroactive for the short and limited period required for congressional debate, the period of national debate cannot be dragged on from year to year and still be "short and limited." In the case of OBRA, the period of time necessary to permit passage of the tax increase for 1993 began in 1987 and ended in 1992. Congress had debated the OBRA legislation in 1984, 1987 and 1992. By any reasonable standard, the "short and limited period required by the practicalities of producing national legislation" had passed. What is required is a reasonable time for Congress to debate whether to pass legislation, not a reasonable time after a reasonable time.

The retroactive aspect of the OBRA rate increase is arbitrary and capricious because it is not tied to any valid legislative purpose. The Court should hold that the retroactive rate increase violates the Takings Clause of the Fifth Amendment to the United States Constitution.

ISSUE 5: ***The Retroactive Tax Increase Violates the Due Process Clause of the Constitution.***

The Fifth Amendment to the Constitution provides: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . . " From 1938 to

1994, the validity of a retroactive tax provision under the Due Process Clause depends on whether "retroactive application is so harsh and oppressive as to transgress the constitutional limitation." ***Welch v. Henry***, 305 U.S. 134, 147, 59 S.Ct. 121, 125 (1938). In 1994, this Court abandoned the harsh and oppressive test in ***United States v. Carlton***, 512 U.S. 26, 114 S.Ct. 2018 (1994). The test of invalidity of a retroactive tax law is no longer whether the law is harsh and oppressive, but whether the retroactivity "is itself justified by a rational legislative purpose." *Id.* at 31, 114 S.Ct. at 2022. The "rational purpose" test shifts the focus away from the effect of the retroactive tax on the taxpayer to the reasonableness of the legislature's action. *See* Note, *Leading Cases*, 108 Harv. L. Rev. 139, 225 (1994); Heather Lynn Gray, Carlton v. United States: *An Analysis of Retroactive Tax Legislation*, 24 Stetson L. Rev. 765, 804 (1995); Note, *The Constitutionality of Retroactive Changes to the Code:* United States v. Carlton, 48 Tax Lawyer 509, 512-13 (1995).

Unlike the tax in *Carlton*, the retroactive tax increase imposed by OBRA is not supported by a "legitimate legislative purpose furthered by rational means." A rational legislative purpose for retroactivity in the *Carlton* tax legislation was found because (1) it was curative legislation, and (2) it established only a modest period of retroactivity. *Id.* at 32, 114 S.Ct. at 2023. OBRA fails both prongs of this test.

a. *The Retroactive Tax Was Not Curative Legislation.*

In *Carlton*, the Court found that there was a rational basis for retroactive application because "Congress acted to correct what it reasonably viewed as a mistake." *Id.* The mistake was made in October, 1986, when as part of a major revision of the Internal Revenue Code Congress added a new estate tax provision that granted a deduction for half of the proceeds of "any sale of employer securities by the executor of an estate" to an employee stock ownership plan (ESOP). *Id.* at 28, 114 S.Ct. at 2020; 26 U.S.C. § 2057. To qualify for the deduction, the sale had only to be made before the estate tax return was due. *Id.* There was no requirement that the shares of stock have been owned by the decedent prior to his death. In December, 1986, Carlton, the executor of a wealthy estate, took advantage of this loophole to reduce the tax on his estate by over $2.5 million.

A few days later, the IRS announced that until "clarifying legislation" could be enacted, it would only grant the section 2057 deduction if the decedent owned the securities in question immediately before his death. A bill to add that requirement was enacted in December, 1987, and the bill made the requirement retroactive back to October, 1986, when the statute was originally enacted. *Id.*

This Court upheld the retroactive application of the amendment. The Court found that Congress needed to impose retroactivity in order to correct a serious mistake. The deduction was never intended to have the broad applicability that clever taxpayers like Carlton had found.

As evidence of the truly mistaken nature of the original enactment, the Court observed that when Congress had passed the law in 1986, it had estimated that the deduction would create a revenue loss of approximately $300 million over a five-year period. Shortly after the passage of the act, however, it became evident that the revenue loss could be as much as $7 billion because the statute permitted executors like Carlton to generate the deduction by means of a device never contemplated by Congress.

There was no mistake for Congress to cure with the retroactive rate increase enacted here. It is not enough to say that Congress had a rational purpose because it wanted to raise revenue. Congress always needs revenue, so under that test there would have been no need for the *Carlton* court to justify the retroactivity of the statute on the basis that it was curative legislation with a short period of retroactivity. In passing the retroactive rate increase in OBRA, Congress had no purpose other than to raise revenue.

There was also no mistake to cure. President Bush absolutely vetoed the legislation extending the fifty-five percent rate. The existing law then did exactly what it was written by Congress to do: it dropped the rates to fifty percent. Nothing was miscalculated. Nothing was misphrased. Congress simply did not enact the higher rates at the end of 1992.

In ***Quarty v. United States***, 170 F.3d 961 (9th Cir. 1999), the Ninth Circuit, dealing with the same situation as this case, found a legitimate purpose for OBRA in the

Report of the House Budget Committee: "[t]o raise revenue to address the Federal deficit, to improve tax equity, and to make the tax system more progressive. . . . " 170 F.3d at 964, 967; H.R. Rep. No. 103-111 at 644 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 875. In declaring this statement sufficient, the Ninth Circuit relied on Justice O'Connor's concurring opinion in *Carlton*, which maintained that the need to raise revenue is reason enough for brief retroactive taxation. *Carlton*, 512 U.S. at 37, 114 S.Ct. at 2025 (concurring op.); 170 F.3d at 967. This contention was not an element of the *Carlton* majority opinion; however, in fact it was the primary issue on which Justice O'Connor disagreed with the majority. NationsBank maintains that the *Carlton* majority rejected Justice O'Connor's argument that revenue-raising serves as a legitimate basis for retroactivity, because the government always needs money, and to permit that as a justification is to require no justification at all. By relying on this line of reasoning in deciding *Quarty*, however, the Ninth Circuit has created a discrepancy in this area of the law.

The same analysis holds for the Ninth Circuit's other legitimate purposes, tax equity and progressivity. These are fine goals, but altogether too amorphous and grandiose to satisfy the specificity *Carlton* requires. To allow such justifications to meet the *Carlton* test is to abrogate the test entirely.

b. ***The Period of Retroactivity Was Not Modest.***

The *Carlton* Court's second reason for upholding the retroactive amendment was that the retroactivity covered a brief period. Retroactivity must be "confined to short

and limited periods required by the practicalities of producing national legislation." 512 U.S. at 33, 114 S.Ct. at 2023. As discussed earlier, the retroactivity imposed by OBRA 1993 had nothing at all to do with the time needed to introduce, debate and vote on legislation. That time period was consumed in 1984 when the higher rates were extended temporarily, in 1987, when they were again extended temporarily and in 1992, when they were not extended.

Two rationales are given for permitting brief periods of retroactivity. One is to prevent persons who will be affected by proposed legislation from taking steps to evade the law while it is being debated and before its passage. *See* ***United States v. Hemme***, 476 U.S. 558, 561-62, 106 S.Ct. 2071, 2074 (1986). As stated before, that reason does not apply here.

Secondly, the Court stated in ***Carlton***, an income tax law may be retroactively applied "to include the receipt of income during the year of the legislative session preceding that of its enactment." 512 U.S. at 33, 114 S.Ct. at 2023, quoting ***Welch v. Henry***, 305 U.S. at 150, 59 S.Ct. at 127. This degree of retroactivity is required in deference to "the power of Congress to require that taxable income should include profits from transactions consummated within the year." ***Cooper v. United States***, 280 U.S. 409, 412, 50 S.Ct. 164, 165 (1930). The difference between income taxes and estate taxes in this respect is immediately apparent: A person is taxed on his income for the entire year, so the taxable event is not completed until at least the end of the year. An estate tax, however, is imposed on the value of the estate at the moment of

death, and any consideration of a one-year or eight-month span is altogether arbitrary.

The retroactive rate increase of OBRA 1993 neither served a curative purpose nor acted retroactively for only the brief period required to enact the legislation. As a matter of law it violates the Due Process Clause of the Fifth Amendment to the Constitution and is void.

ISSUE 6: ***The Retroactive Tax Increase Violates Equal Protection Guarantees of the Constitution.***

The Fifth Amendment guarantees equal protection. ***Bolling v. Sharpe,*** 347 U.S. 497, 74 S.Ct. 693 (1954). Thus the doctrines of equal protection developed under the Fourteenth Amendment apply to the federal government as well as to the states.

As the government has characterized the tax burden in this case, NationsBank was not denied equal protection of the laws; rather it was given precisely equal protection by being required to pay taxes at the same rate as any other comparably valued estate since 1984. The government mischaracterizes NationsBank's claim. NationsBank's complaint is that the Garwood estate was taxed on the basis of a rate that was not in effect on the date of death, whereas all estates not just since 1984 but since the estate and gift tax was enacted in 1916 have been taxed at the rate in effect on the date of death. *See* George, *Digging Up New Revenue,* 96 W. Va. L. Rev. at 979 n.39. No other estate had a surcharge added to its tax bill by a law not passed until after the date of death. So there is a denial of equal treatment; the question is whether that amounts to a violation of the Equal Protection Clause.

Until recently a tax did not violate equal protection if the government's ends were legitimate and the means employed to achieve those goals were (1) rational in the abstract and (2) effective in the circumstances presented. *See* ***Williams v. Vermont***, 472 U.S. 14, 31, 105 S.Ct. 2465, 2476 (1985) (O'Connor, dissenting). The Supreme Court greatly modified that analysis in ***Metropolitan Life Ins. Co. v. Ward***, 470 U.S. 869, 105 S.Ct. 1676 (1985). Previously it took little thought to uphold a tax statute. If the end was legitimate (to promote domestic business, for example) and if the method chosen to achieve the goal was rational (such as taxing foreign corporations at a higher rate than domestic) the tax would pass the very slight scrutiny given under the Equal Protection Clause. The two prongs of the test – whether the government's goal is legitimate, and whether it is rational to achieve the goal by the means chosen – were considered separately. *Id.* at 884, 105 S.Ct. at 1685 (O'Connor, dissenting). Under that methodology, it is legitimate for a state to promote domestic business, and it is eminently rational to do that by charging foreign corporations higher taxes; *voilà*, the tax meets equal-protection standards.

Not so, said the Court in ***Metropolitan Life***. The Court altered the rules, so that "legitimate goal" and "rational means" are no longer viewed in the abstract. It is not enough to determine whether the means are rational. The test is whether the governmental purpose is legitimate when furthered by means that are concededly rational, but are discriminatory. 470 U.S. at 882, 105 S.Ct. at 1684. As the dissent forcefully pointed out, this is a substantially different measure of scrutiny, and one that

makes it more difficult for the tax to satisfy the requirements of equal protection. 470 U.S. at 883, 898, 105 S.Ct. at 1684, 1692.

In the present case, the court below found that Congress' goals were to raise revenue, to improve tax equity and to make the tax system more progressive. (App. 30); 44 Fed. Cl. at 667.[1] Under the standards of ***Metropolitan Life,*** the government must show that these goals are legitimate when furthered by the discriminatory technique of taxing a few estates at rates that were not authorized when the taxable event occurred.

To raise revenue. As discussed earlier, the government's desire to raise revenue is always present. No tax would ever violate the Equal Protection Clause if raising revenue were a sufficient state interest. Therefore the goal of raising revenue is generally disregarded in the equal-protection analysis. *See generally* ***Metropolitan Life Ins. Co.,*** 470 U.S. 869, 105 S.Ct. 1676; *see* ***Williams v. Vermont,*** 472 U.S. at 25, 105 S.Ct. at 2473 (discounting "the simple desire to raise funds").

To improve tax equity and make the tax system more progressive. These are valid governmental reasons for imposing the higher rates prospectively, where no discrimination is exercised, but these goals are not legitimate when furthered by discriminatory retroactive taxation. Both of these goals would be well served, for example, by

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[1] It is true, as the court below found, that a House committee report gave those reasons for reinstating the higher rates, but the committee did not attempt to justify specifically the retroactive feature of the bill. *See* ***Quarty v. United States,*** 170 F.2d at 964. It is the retroactivity that is discriminatory.

retroactively raising the estate tax to seventy-seven percent on all estates created after 1976, when the seventy-seven percent rate was abolished. One cannot imagine that law would be upheld against an equal-protection challenge that it singled those taxpayers out of all who went before and all who might come after, to be taxed at higher rates than the law allowed on the date of death.

The retroactive rate increase in the present case deprives NationsBank of equal protection of the laws, and the Court should declare it unconstitutional.

CONCLUSION

The Court should reverse the court below and render judgment that the retroactive tax rate challenged in this case is unconstitutional, and that NationsBank is entitled to a refund from the United States of $1,320,190.07, plus interest at the highest rate provided by law, together with costs and general relief.

SUBMITTED this 22nd day of April, 2002.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: 10/30/01

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and suggestions for rehearing in banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Each side shall bear its own costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The Clerk deems a reasonable time to be 15 days from the date the final mandate is issued.)

JAN HORBALY
Clerk

cc: HUGH LOWE
ELLEN PAGE DELSOLE

NATIONSBANK OF TEXAS V US, 00-5113
CFC-98-CV-21

App. 2

United States Court of Appeals
for the Federal Circuit

00-5113

NATIONSBANK OF TEXAS, N.A.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Hugh Lowe, Osborne, Lowe, Helman & Smith, L.L.P., of Austin, Texas, argued for plaintiff-appellant. With him on the brief was *Duncan E. Osborne*.

Ellen Page DelSole, Attorney, Tax Division, Appellate Section, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief was *Teresa E. McLaughlin*, Attorney. Of Counsel was *Donald B. Tobin*, Attorney.

Appealed from: United States Court of Federal Claims

Judge Edward J. Damich

DECIDED: October 30, 2001

Before RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and DYK, *Circuit Judge*.

Opinion for the court filed by *Circuit Judge* RADER. *Senior Circuit Judge* PLAGER dissents.

RADER, *Circuit Judge*.

On summary judgment, the United States Court of Federal Claims held that NationsBank of Texas, acting as independent executor of the Estate of Ellen Clayton Garwood, deceased, could not recover estate taxes. *NationsBank v. United States*, 44 Fed. Cl. 661, 669 (1999). Because the Court of Federal Claims correctly held that section 13208 of Title XIII of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13208, 107 Stat. 312, 469 (OBRA), is constitutional, this court affirms.

I.

The federal estate tax law imposes a tax on the transfer of decedents' estates. The rate schedule at 26 U.S.C. § 2001(c) sets the amount of the tax. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 402, 95 Stat. 172, 300-01, contained a scheduled reduction in maximum estate tax rates from the then-current rate of seventy percent down to fifty percent over four years. When the top rate was fifty-five percent, the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 21, 98 Stat. 494, 506, extended that rate through 1987. Later the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203,

§ 10401(a), 101 Stat. 1330, 1330-430, further extended the top rate of fifty-five percent until January 1, 1993.

In late 1992, Congress passed legislation to extend the fifty-five percent rate again, but did not present it to the President within ten days of adjournment. President Bush did not sign it, instead using a "pocket veto" under Article I, Section 7, Clause 2 of the Constitution. Thus, the fifty-five percent rate lapsed on January 1, 1993. The highest rate defaulted to the previously scheduled fifty-percent rate.

When Ms. Ellen Clayton Garwood died in March 1993, with a gross estate of $28,108,968.72, the applicable estate tax rate was fifty percent. On August 10, 1993, President Clinton signed OBRA into law. Section 13208 of Title XIII of OBRA amended 26 U.S.C. § 2001(c), permanently increasing the estate tax rate for the transfer of taxable estates over $3,000,000 back to the fifty-five percent rate. OBRA also made the rate increase retroactive to include the estates of decedents who died on or after January 1, 1993. Under these provisions, Ms. Garwood's estate fell subject to the fifty-five percent rate.

NationsBank sought a refund of $1,320,190.07, the difference in tax paid under the retroactively applied fifty-five percent rate and the former fifty percent rate in effect on the date of Ms. Garwood's death. In its complaint filed in the Court of Federal Claims, NationsBank asserted that OBRA's retroactive rate increase violated several provisions of the Constitution, including the separation of powers doctrine, the apportionment clause, the *ex post facto* clause, the takings clause, the due process

clause, and the equal protection clause. On the Government's summary judgment motion, the Court of Federal Claims addressed counts one through six of NationsBank's complaint and held that OBRA did not violate the Constitution. *NationsBank*, 44 Fed. Cl. at 664-69. The parties then stipulated to the dismissal of count seven, the only remaining count, and the Court of Federal Claims dismissed the complaint. NationsBank appeals. This court has jurisdiction under 28 U.S.C. § 1295(a)(3) (1994).

II.

This court reviews the Court of Federal Claims' grant of summary judgment without deference. *Abrahamsen v. United States*, 228 F.3d 1360, 1362 (Fed. Cir. 2000). Summary judgment is appropriate where the record shows no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The determination of the constitutionality of a statute is a question of law, which this court reviews without deference. *Demko v. United States*, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

Article I, Section 7, Clause 2 of the Constitution requires presentation of a bill to the President. That clause also states:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. Const. art. I, § 7, cl. 2. As described above, President Bush did not sign a bill to extend the fifty-five percent rate beyond January 1, 1993. Because Congress prevented return of the bill by adjourning, President Bush "pocket vetoed" the bill under Article I, Section 7, Clause 2.

OBRA made the fifty-five percent rate retroactive to January 1, 1993, which had the same effect as if President Bush had signed the bill presented to him in 1992. However, OBRA did not abrogate the President's pocket veto power. OBRA was separate from the bill that the President pocket vetoed in 1992. OBRA independently met the constitutional requirements for enactment, namely passage by both houses of Congress and approval by the President. Nothing in the Constitution prohibits a new Congress, or even the same Congress, from reenacting defeated legislation. This principle applies as well to legislation rejected by a pocket veto. *United States v. Weil*, 29 Ct.Cl. 523, 547 (1894). Article I, Section 7, Clause 2 of the Constitution prohibits enactment of a bill not presented in time. Article I, however, does not prohibit Congress from reintroducing and passing again the same subject matter in another bill. Moreover the second bill may have a retroactive effect. Therefore, section 13208 does not violate the separation of powers doctrine.

III.

The apportionment clause states: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. Const. art. I, § 9, cl. 4. A tax is direct if levied directly upon property, such as an *ad valorem* tax on a

decedent's estate; it is not direct if levied on the transfer of property from one person to another. *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945). The federal estate tax is not imposed on the property itself, but rather on the transfer of property at the time of death. Therefore, the estate tax is not a direct tax. *Id.*

The retroactive application of the increased rate in this case did not change the estate tax from an indirect to a direct tax. The lower rate was in effect at the time of the actual property transfer. Notably, Ms. Garwood's estate was subject to a fifty percent tax rate at the time of her death. Section 13208, however, did not impose a new tax on property already transferred, but merely increased the rate of the indirect tax on the transfer which had occurred earlier. The five-percent increase in the rate, even applied retroactively, does not change the character of the estate tax from a non-direct tax to a direct tax. The tax is still a tax on the transfer of property. *See Milliken v. United States*, 283 U.S. 15, 24 (1931) (a "mere increase in the tax . . . did not change its character"); *First Nat'l Bank v. United States*, 420 F.2d 725, 732 (Ct. Cl. 1970). Therefore, section 13208 does not violate the apportionment clause.

IV.

The Constitution prohibits enactment of an *ex post facto* law. U.S. Const. art. I, § 9, cl. 3. This prohibition, however, applies solely to criminal enactments. *Calder v. Bull*, 3 U.S. 386, 390-91 (1798). The Supreme Court's decision in *Burgess v. Salmon*, 97 U.S. 381, 384 (1878), does not make section 13208 criminal in nature and thus within the *ex post facto* prohibition. In *Burgess*, the Supreme Court

stated: "To impose upon the owner of the goods a criminal punishment or a penalty" for not paying a retroactive tobacco tax increase before the tax became effective would subject the owner to the operation of an *ex post facto* law. *Id.* Accordingly, the Court held that the tax increase was unconstitutional because the Government could have brought a criminal action against the taxpayer for not paying the increased taxes before the tax became effective. *Id.* at 384-85. At the outset, the taxpayer in this case has timely paid the tax and seeks a refund. Thus, the taxpayer is not subject to any criminal penalty. In this sense, this case is significantly different from *Burgess.*

Although the tax code does contain many provisions eventually subjecting recalcitrant taxpayers to criminal liability for refusing to pay taxes, the entire tax code is not criminal in nature. If the entire tax code were criminal, every retroactive tax law would become an unconstitutional *ex post facto* enactment. To the contrary, the Supreme Court has acknowledged Congress' constitutional authority to enact retroactive tax laws. *See, e.g., United States v. Carlton,* 512 U.S. 26 (1994).

In *Burgess,* the statute imposed criminal penalties on taxpayers who refused to pay increased taxes on goods shipped before enactment of the tax increase. 97 U.S. at 384. The taxpayers in *Burgess* sought a refund of the increased amount of the tax because they could not have avoided the increase on goods already shipped. *Id.* at 382. Thus, the *Burgess* taxpayers could not avoid potential criminal penalties. Unlike the taxpayer in *Burgess,* NationsBank could have, and did, avoid any possibility of criminal sanctions. NationsBank timely paid the additional tax and brought a refund suit. The Government

could only have imposed criminal sanctions on NationsBank if NationsBank had committed criminal fraud after the enactment of OBRA.

This court notes that the dissent in this case is not the only criticism of the limitations on *ex post facto* prohibitions acknowledged in *Calder.* However, the Supreme Court has not overruled *Calder.* Thus, this court must follow that rule. Because section 13208 of OBRA is not a criminal statute, it is not an *ex post facto* enactment.

V.

A retroactive tax can constitute a taking under the Fifth Amendment of the Constitution if the retroactive feature makes it "so arbitrary and capricious as to amount to confiscation." *Nichols v. Coolidge,* 274 U.S. 531, 542-43 (1927). Furthermore a retroactive tax can be a taking if the retroactive reach extends temporally beyond "short and limited periods required by the practicalities of producing national legislation." *United States v. Darusmont,* 449 U.S. 292, 296-97 (1981).

The legislative process that resulted in the enactment of section 13208 took from February 1993 to August 10, 1993. Section 13208 extended its retroactive reach back only one additional month to the beginning of 1993. Notably, the Supreme Court has previously upheld as "modest" an estate tax revision that reached back fourteen months. *Carlton,* 512 U.S. at 32. In this case, the retroactive extension of section 13208 encompassed only the "short and limited periods required by the practicalities of producing national legislation." *Darusmont,*

449 U.S. at 297. Thus, the Court of Federal Claims correctly held that section 13208 did not constitute a taking under the Fifth Amendment.

Moreover, the Supreme Court has noted that where "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violat[ed] the takings clause." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641 (1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)). Moreover, this court has echoed: "[T]he Supreme Court has regarded the Takings Clause as a first cousin of the doctrine of substantive due process." *Branch v. U.S.*, 69 F.3d 1571, 1578 (Fed. Cir. 1996). Therefore, because the retroactivity challenge to this enactment can not succeed under due process standards as discussed below, the challenge under the takings clause also fails.

VI.

Under the due process clause of the Fifth Amendment, "a rational legislative purpose" must justify a retroactive enactment. *Carlton*, 512 U.S. at 31. In other words, statutes "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

In *Carlton*, the Supreme Court upheld the retroactive application of the estate tax to correct a mistake that had afforded an unjustified tax loophole. 512 U.S. at 32-33.

Carlton does not stand for the proposition, however, that a retroactive enactment only has a rational legislative purpose when it corrects a mistake to close a loophole. Indeed all legislation in some sense corrects a perceived deficiency in past legal remedies and standards. The Supreme Court in *Carlton,* however, did not limit the retroactive application of revenue measures solely to enactments with a curative purpose. Rather the Supreme Court noted that timing was the essential purpose of making that enactment retroactive. The Supreme Court found the "rational legislative purpose" for the timing change in the procedural promptness of the enactment, accepting the reasoning of the Legislative Branch that the benefits of a "modest" retroactive application outweighed the burdens. *Id.* at 32. The Court noted that the prompt enactment only imposed a "modest" fourteen-month retroactive period. *Id.* at 32. Likewise, in this case, section 13208 promptly filled the temporal gap in the fifty-five percent rate. Imposition of a uniform fifty-five percent rate on estate tax transfers regardless of the particular month in which they occur suffices to supply the requisite rational purpose. Accordingly, NationsBank has not established that the "modest" eight-month retroactive period of section 13208 was arbitrary and irrational.

Another "rational legislative purpose" justifies this enactment. As noted below, this enactment achieves the purpose of treating similarly situated taxpayers similarly. Because this rational legislative purpose invokes an equal protection analysis, the next section of this discussion sets forth that purpose.

VII.

Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the Supreme Court has applied equal protection principles to the federal government under the Fifth Amendment's due process protections. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). "This standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). NationsBank argues that the retroactive effect of section 13208 discriminated against it by requiring it to pay higher taxes than the law required when the taxable event occurred. NationsBank also asserts that the need to raise revenue to reduce the budget deficit alone is not a legitimate governmental interest for retroactive application of section 13208.

Section 13208 did not discriminate against any narrow class of taxpayers because it did not treat any "other group" more advantageously. In fact, this legislation promoted tax equity and gave itself a further rational purpose by putting a first group of estates, those of decedents who died between January and August 1993, in parity with a second group of estates, those of decedents who died either during the nine years before 1993 or after August 1993. Were it not for section 13208's retroactive effect, the estate tax law would have applied a lower rate

to the first group of estates, giving them more advantageous treatment than the second group of estates. Under section 13208, the estate tax law treats both groups equally. Accordingly, section 13208 not only complies with equal protection principles, it furthers those principles. Section 13208's retroactive effect does not violate equal protection principles because it is rationally related to the legitimate governmental purpose of raising revenue and fairly distributing the tax burden.

CONCLUSION

The Court of Federal Claims correctly concluded that section 13208 complies with the requirements of the Constitution.

COSTS

Each party shall bear its own costs.

AFFIRMED

PLAGER, *Senior Circuit Judge*, dissenting.

I cannot dispute that the weight of judicial opinion, though not the weight of either history or logic, currently argues for affirming the judgment of the trial court; the majority dutifully rounds up the usual judicial suspects. But there are times when the gap between law and justice is too stark to be ignored. This is one of them. It is simply unfair, and I believe it should be unconstitutional, in these circumstances to enact a statute that imposes a tax

on a citizen based on an event that occurred before the tax was enacted. Retroactive legislation is inherently offensive to the natural law of decency, to the principles of the social compact set out in the Declaration of Independence, and to the underlying tenets of the Constitution. And from the viewpoint of the taxpayer, it is no help to say that the basic tax was already in place, only the amount has increased; it is the amount that counts.

Yes, the majority has the law on its side, if following what other courts have said is the law. Perhaps understandably, courts have been unwilling to confront Congress in an area that has been viewed as peculiarly the province of the legislature: the raising of revenue for the Government's purposes. In so doing, however, fundamental constitutional principles have had to be bent and distorted.

Plaintiff in this case cites a number of constitutional principles that could well dictate a result opposite to that reached. I need address only one. Article I, Section 9 of the United States Constitution, reciting the powers of and restrictions on Congress, provides that "No . . . ex post facto Law shall be passed." The courts tell us that this provision certainly applies to criminal laws – it would be unconstitutional to criminally punish someone more harshly for an act based on a law enacted after the act was committed. Yet the same courts tell us that it is not unconstitutional to tax away a citizen's property based on a harsher law enacted after the event that triggered the tax.

Most citizens are basically law-abiding, and live and die with little if anything that could be called criminal on

their records. But few citizens who live long enough to become economic contributors die without being subjected to an *ex post facto* tax assessment of one kind or another. That is wrong. The Constitution should work for the benefit of the law-abiding as well as those who run afoul of the law. Nothing in Article I, Section 9 says otherwise.

Congress is perfectly capable of raising all the revenue it needs without making its tax laws reach backward, taking property from citizens based on events that, at the time they occurred, were not subject to the new law. Congress has its role, but that role must be consonant with basic principles of law, which include fundamental notions of fairness and fair-dealing. The Constitutional prohibition against *ex post facto* laws rests upon those notions. The preservation of individual freedom requires the protection of property rights as well as liberty interests.

The trial court observed that an interpretation of the Constitution such as this suggests would make every retroactive tax law *ipso facto* an unconstitutional *ex post facto* law. That is not necessarily so. There may be compelling circumstances in which it is necessary to the essential working of government – for example, when national security concerns are involved – that a law, perhaps even a tax law, be made retroactive. This is not such a case. Here, Congress attempted to make the increased tax rate effective at a time when it would have properly applied to this decedent. The President, pursuant to his Constitutional authority, prevented that law from taking effect. Now Congress seeks to attain the same result by subsequent legislation made retroactive. Congress should not

be permitted to disregard an exercise of the President's Constitutional authority, and a citizen's property rights should not be subjected to such high-handed governmental action when there is no compelling reason to justify it.

The Supreme Court often has said that retroactivity is not favored. If Congress fails to heed that injunction, and to treat its citizens fairly, consistent with Constitutional principles, it is the duty of the courts to say so. The origin of the notion that *ex post facto* civil legislation is not precluded by Article I, Section 9, is attributed to *Calder v. Bull*,[1] a 1798 Supreme Court decision in which several of the Justices opined on the subject. Neither history[2] nor logic[3] supports the proposition. Even those who attempt to find some reason for the distinction confess its shortcomings.[4]

It is time for the Justices of the Supreme Court to make their views clearly understood, and to assign *Calder v. Bull* and its progeny to the historic dustbin where they belong. See, e.g., Justice Thomas, concurring in *Eastern*

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[1] 3 U.S. (3 Dall.) 386 (1798).

[2] *See, e.g.*, Oliver P. Field, *Ex Post Facto in the Constitution*, 20 Mich. L. Rev. 315 (1921).

[3] *See, e.g.*, Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L.J. 2143 (1996). For an exhaustive, and scathing, critique of current Supreme Court jurisprudence on the topic, see Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301 (1996).

[4] Krent, *supra*. *See also* Laurence H. Tribe, *American Constitutional Law* § 10-2 (2d ed. 1988).

Enterprises v. Apfel, 524 U.S. 498, 538-39 (1998), and Justices O'Connor and Scalia (with whom Justice Thomas joined), concurring separately in *United States v. Carlton*, 512 U.S. 26, 35-42 (1994).

I would reverse, and hold for the estate of the decedent.

In the United States Court of Federal Claims

No. 98-21 T

NATIONS BANK OF TEXAS,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's opinion issued on June 17, 1999, and the Order, filed June 1, 2000,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is entered for defendant on counts one through six of the complaint. Count seven, the remaining count in this case, is dismissed with prejudice pursuant to the stipulation of dismissal filed by the parties on May 31, 2000. Each party shall bear its own costs of litigation with respect to count seven, including any attorney's fees.

Margaret M. Earnest
Clerk of Court

June 1, 2000 By: /s/ Lisa L. [Illegible]
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

In the United States Court of Federal Claims

No. 98-21 T

(Filed: June 17, 1999)

(Reissued for Publication on August 30, 1999)[1]

* * * * * * * * * * * * * *

NATIONSBANK OF TEXAS, Plaintiff, v. **THE UNITED STATES,** Defendant.	Omnibus Budget Reconciliation Act of 1993 (Retroactive legislation); Separation of Powers; Pocket Veto; Apportionment Clause; Due Process; Equal Protection; Takings Clause; Ex Post Facto Clause; 26 U.S.C. § 2001(c)

* * * * * * * * * * * * * *

Hugh Lowe, Austin, Texas, for plaintiff. *Duncan E. Osborne*, Austin, Texas, of counsel.

Mary M. Abate and Mildred L. Seidman, Tax Division, U.S. Departmetn of Justice, Washington, DC, for defendant, with whom was *Loretta C. Argrett*, Assistant Attorney General.

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[1] The Court's original opinion was entered as unpublished on June 17, 1999. This reissuance as a published opinion follows in response to Defendant's request for written publication. Additionally, as requested by Plaintiff, paragraph 8, beginning on page 2 below, modifies the previous paragraph 3, page 2, of said unpublished Court opinion dated June 17, 1999, and clarifies the refund claim amount in controversy in Counts One through Six of the Complaint. The outcome of the opinion is not affected.

OPINION

DAMICH, Judge.

The complaint in this tax refund case was filed January 9, 1998. A First Amended Complaint filed October 19, 1998, presents seven counts.

The case is before the Court on Plaintiff's Motion for Partial Summary Judgment regarding the Constitutional issues presented by Plaintiff's Rate of Taxation Claim in the amount of $1,320,190.07, as set forth in Counts One through Six of the Amended Complaint and Defendant's Cross-Motion for Partial Summary Judgment regarding Counts One through Six of the Amended Complaint. Plaintiff's motion is DENIED for the following reasons. Defendant's motion is hereby GRANTED.

Plaintiff's Deduction Claim in Count Seven of the Amended Complaint is not covered by the cross motions or this opinion.

BACKGROUND

On December 20, 1993, Plaintiff filed a federal estate tax return with the IRS at Austin, Texas, and with it paid $11,121,906.63 in federal estate tax. Plaintiff is NationsBank of Texas, N.A., a national banking institution acting as Independent Executor for the Estate of Ellen Clayton Garwood.

The federal estate tax laws at 26 U.S.C. §§ 2001-2209 (Code) impose a tax on the transfer of assets in respect of decedents' estates. The amount of the tax is computed in accordance with the rate schedule at 26 U.S.C. § 2001(c).

The Economic Recovery Tax Act of 1981 (ERTA) contained a scheduled reduction in maximum estate tax rates from the then current rate of 70 percent down to 50 percent over four years. When the top rate was at 55 percent Congress extended that rate through 1987 by enacting the Deficit Reduction Act of 1984. In late 1987, Congress again extended the top rate of 55 percent until January 1, 1993.

In late 1992 Congress passed legislation to extend the 55 percent rate again, but failed to present it to the President within ten days of adjournment. President Bush refused to sign it, thereby subjecting it to a pocket veto pursuant to the powers granted the President in Article 1, § 7 of the Constitution. Consequently the highest rate defaulted to the previously scheduled (ERTA) 50 percent rate. *See* H.R. 11, § 3006, *reported in* H.R. Conf. Rep. No. 1034, 102d Cong. (1992).

When decedent died on March 20, 1993, with a gross estate of $28,108,968.72, the applicable estate tax rate was 50 percent. On August 10, 1993, President Clinton signed into law the Omnibus Budget Reconciliation Act of 1993 (OBRA). Section 13208 of Title XIII of OBRA amended 26 U.S.C. § 2001(c), permanently increasing the estate tax rate for the transfer of taxable estates over $3,000,000 back to the 55 percent rate. This rate increase was made retroactive to include the estates of decedents who died on or after January 1, 1993.

Plaintiff's refund Claim on Form 843, timely filed, sought a refund of $1,320,190.07, the difference in tax paid under the retroactively applied 55 percent rate and

the former 50 percent rate in effect on the date of decedent's death (Counts One through Six of the Complaint). Plaintiff also sought a refund of $35,107.89, the difference between claimed and allowed deductions for administrative and legal expenses of the estate, as well as additional deductions of an undetermined amount accrued in this case (Count Seven of the Complaint). The issue of Plaintiff's entitlement to the additional $35,107.89 in deductions, as well as any undetermined additional amounts, is to be decided separately.

DISCUSSION

Defendant agrees entirely with Plaintiff's First Amended Proposed Statement of Uncontroverted Facts, and states that there are no genuine issues of fact material to the legal issues that are the subject of the parties' cross-motions. Summary Judgment is appropriate under RCFC 56 where the pleadings raise no genuine dispute as to any material fact and, as a matter of law, the moving party is entitled to judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, (1986). *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Count One:

Violation of Separation of Powers Under Article 1, § 7, cl. 2 of the Constitution

Article 1, § 7, cl. 2 of the Constitution provides:

> Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a Law, be presented to the President of the United States; If he approve he

> shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Plaintiff argues that the retroactive legislation is invalid because it violates the separation of Powers doctrine. According to Plaintiff, the effect of the retroactive application of § 13208 in OBRA '93 was to undo President Bush's pocket veto in violation of the separation of powers doctrine. The pocket veto is the strongest veto available to the President because Congress is unable to override it. It was granted by the framers of the Constitution as a check against last-minute legislation. Plaintiff claims that the framers' goal has not been served if it is permissible for the new Congress and President to pass the same legislation, making it retroactive to the date of the pocket veto. It is Plaintiff's position that Congress may enact pocket-vetoed legislation only prospectively. *The Pocket Veto Case*, 279 U.S. 655, 679 n. 6 (1929).

The Plaintiff misunderstands the legislative history of OBRA '93. OBRA '93, including § 13208, was not a act of Congress undertaken unilaterally to circumvent the

Executive since it was signed by President Clinton. Furthermore, it was not a resuscitation of the pocket-vetoed legislation, but was an entirely new bill, introduced as H.R. 2264 during the first session of the new 103rd Congress. There is no Constitutional prohibition against the reintroduction and enactment of defeated legislation by a later or even the same Congress, whether or not the pocket veto is involved. *United States v. Alice Weil*, 29 Ct. Cl. 523, 547 (1894).

Moreover, *The Pocket Veto Case* cited as indirect authority by Plaintiff, is distinguishable from this case. Unlike the situation in that case, OBRA '93 was legislation introduced by a different Congress. In addition, *The Pocket Veto Case* dealt with the situation where a bill passed by Congress during its first session was pocket vetoed when Congress adjourned at the end of that session and in that instance fails to become law. (*Id.* at 679). Then,

> [I]f Congress so desires the same bill may be reintroduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses.

(*Id.*, n. 6).

The Court holds that the 1993 retroactive increase in tax rates did not violate the Separation of Powers Doctrine expressed in Article I, Section 7 of the Constitution.

Count Two:

Violation of the Apportionment Clause under Article 1, §§ 2 and 9 of the Constitution

"No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Article I, § 9, cl. 4 of the Constitution, in conjunction with Article 1, § 2 of the Constitution which establishes the method of apportionment. A tax is direct if levied directly upon property, such as upon a decedent's estate, but is not direct if the tax is upon the transfer of property from one person to another. The Supreme Court has held that the federal estate tax is not a direct tax. *Bromley v. McCaughn*, 280 U.S. 124 (1929); *Fernandez v. Wiener*, 326 U.S. 340 (1945).

Plaintiff does not question the Constitutionality of the entire estate tax imposed by § 2001(a). It is Plaintiff's position, however, that because § 13208 was not in effect when the property rights transferred, the 5 percent increase imposed retroactively constitutes a direct tax and is thus prohibited. On two occasions, Plaintiff argues, the Court has found that Congress does not have the power to tax a transfer made before the tax act is in effect if the transfer is not made in contemplation of death. *Nichols v. Coolidge*, 274 U.S. 531 (1927) (the statute was not allowed to reach back and tax a gift that was made and became completely vested long before enactment at a time when the tax burden could not have been foreseen although the actual transfer occurred within the statutory period); *Untermyer v. Anderson*, 276 U.S. 440 (1928).

It is important to note that the two cases cited did not present Apportionment Clause claims. Further, Plaintiff

has failed to acknowledge what the Court said about *Nichols* and *Untermyer* in *Milliken v. United States*, 283 U.S. 15 (1931). There the Court stated that "a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the court." *Id.* at 20.

Plaintiff also has failed to make the distinction between a statute that establishes a new tax and a statute that just changes the rate of an already established tax. In both *Nichols* and *Untermyer* the statute at issue levied a new tax not just a rate change. The Court in *Milliken* stated that a "mere increase in the tax . . . did not change its character." 283 U.S. at 24. It is the transfer of property that occasions the imposition of the estate tax and that excise imposed upon a granted privilege cannot "convert such tax to a direct levy on property" just by its retroactive application. *First Nat'l Bank in Dallas v. United States*, 190 Ct. Cl. 400, 420 F.2d 725, 726 (Ct. Cl. 1970). It is undisputed that the tax imposed by Code § 2001(a) was in effect at the moment of death in this case to tax the entire transfer. Section 13208 of OBRA '93 just applied a higher rate, not a new tax, to the entire amount transferred.

United States v. Manufacturers National Bank of Detroit, 363 U.S. 194 (1960) did present an Apportionment Clause claim. In that case, although the transfer involved actions which predated the implementation of the taxing statute, the resulting taxation of the estate was not thereby converted into a prohibited direct tax. Likewise, in this case, although the Garwood transfer at the death of decedent

occurred before §13208 became law, it could be brought within the coverage of the rate increase without violating the Apportionment Clause.

The Court holds therefore, that the 1993 retroactive increase in tax rates does not constitute a direct tax as to any portion of the Garwood Estate and does not violate the Apportionment Clause of Article I, §§ 2 and 7 of the Constitution.

Count Three:

Denial of Due Process under the Fifth Amendment to the Constitution

The Fifth Amendment to the Constitution provides: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . " The test of invalidity of a retroactive tax law is whether the retroactive nature of the law "is itself justified by a rational legislative purpose." *United States v. Carlton*, 512 U.S. 26 (1994). In *Carlton* the Supreme Court upheld the retroactive application of an estate tax provision to correct a mistake that had afforded an unjustified tax loophole. Plaintiff argues that § 13208 of OBRA '93 violates the Due Process Clause of the Fifth Amendment to the Constitution because there was no mistake for Congress to cure with the retroactive rate increase enacted in this case, and therefore there was no rational legislative purpose for the retroactive application of § 13208.

Plaintiff is mistaken, however, because in *Carlton* the Supreme Court did not limit the retroactive application of revenue measures solely to situations where there is a curative purpose involved. The Court held that there

must be a "rational legislative purpose" (*Id.* at 30-31, quoting *Pension Benefit Guaranty Corp.*, 467 U.S. 717, 730 (1984)) and that the curative nature of the legislation in that case served such a purpose. The Court also held that the retroactive period must be "modest" and not excessive. (*Carlton*, 512 U.S. at 32-33). In that case a period of slightly over a year was found to be acceptable, which is five months longer than the retroactive period established by § 13208 of OBRA '93.

The Court has made it clear that statutes "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and. . . . the burden is on one complaining of a due process violation to establish that the legislation has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

The Court holds that Plaintiff has not met that burden. The 1993 retroactive increase in tax rates is within precedential limits and does not violate the Due Process Clause of the Fifth Amendment to the Constitution.

Count Four:

Denial of Equal Protection under the Fourteenth Amendment to the Constitution

Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, equal protection principles have been applied at the federal level under the Fifth Amendment's due process protections. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Plaintiff argues that in this case a group of taxpayers, including Plaintiff, was discriminated against in being required to pay higher

taxes than the law required when the taxable event occurred. In cases that do not affect a fundamental right and where the subject class is not one for whom the law gives special protection (e.g., race, national origin, gender), laws that affect a particular class of persons more harshly than others will be struck unless the government can espouse a rational relationship to a legitimate governmental goal. *See, e.g., Williams v. Vermont,* 472 U.S. 14 (1985). The rational basis test requires the law in controversy to have a rational relationship to a legitimate governmental interest. The need to raise revenue to reduce the budget deficit alone is an indefensible reason, according to *Carlton,* 512 U.S. at 37, therefore § 13208 is unconstitutional. Further, Plaintiff asserts that the Court has strengthened the rational basis test, and has required that the reasonableness of all legislative class designations be reviewed in a more meaningful manner. For example, in *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 (1985), a state law that imposed a higher tax on out-of-state insurance companies than on instate companies violated equal protection guarantees.

Plaintiff overlooks a crucial point. In this case, no narrow class of taxpayers was discriminated against by § 13208. There was no "other group" whose treatment was more advantageous. Instead, this taxpayer and others similarly situated would have been the only "other" group involved and would have been treated more advantageously than all other decedents since 1984 had this legislation not reinstated the previous rate. Section 13208 put all decedents having estates valued in excess of $3,000,000 who died during the period of 1984

through the present, including those who died during the retroactive period, on an equal footing.

It has been made clear that "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . This standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger v. Hahn*, 515 U.S. 1, 11 (1992). See also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, (1920). The Supreme Court has said, "Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. See *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990); *Bowen v. Gilliard*, 483 U.S. 587, 600-603 (1987); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-179 (1980); *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970)." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

The Court finds that in addition to the legitimate governmental purpose of raising revenue and distributing the tax burden, this legislation promoted tax equity by putting the estates of decedents dying between January 1, 1993, and August 10, 1993, in parity with the estates of decedents who died during the previous nine years and those who died after August 10, 1993, therefore § 13208 affirmatively promoted equal tax treatment by retroactively reestablishing the 55 percent rate that had

been in effect for decedents who died during the preceding nine years and that would be in effect in the future.

The Court holds that the 1993 retroactive increase in tax rates does not violate the equal protection guarantees of the Due Process Clause of the Fifth Amendment to the Constitution.

Count Five:

Violation of Takings Clause under the Fifth Amendment to the Constitution

The Takings Clause of the Fifth Amendment to the Constitution provides: "[N]or shall private property be taken for public use, without just compensation." Plaintiff argues that OBRA's retroactive rate increase violates this prohibition and cites *Nichols v. Coolidge,* 274 U.S. 531 (1927) for the proposition that the retroactive feature of a tax law may make it "so arbitrary and capricious as to amount to confiscation" and *United States v. Darusmont,* 449 U.S. 292, 296 (1981) for the proposition that the permissible period the retroactive tax may cover is confined to the "short and limited periods required by the practicalities of producing national legislation."

Plaintiff points out that there is a difference between income tax and estate tax. The taxpayer is being taxed on income acquired during the whole year, justifying a retroactive application to cover that period. The estate tax, however, is based on a momentary event, the transfer of title at the death of the decedent which makes a retroactive period of eight months arbitrary and § 13208 therefore unconstitutional under the Takings Clause.

This argument is not convincing because the legislative process that resulted in the enactment of §13208 of OBRA '93 took from February 1993 to August 10, 1993, and it was made retroactive just one additional month to the beginning of the year, January 1, 1993. The Supreme Court held that the 14-month retroactive period of an estate tax statute was "modest" and thus not offensive of due process. *United States v. Carlton*, 512 U.S. 26, 32-33 (1994). Had § 13208 been made retroactive only during the pendency of the legislation it would not have helped Plaintiff since the decedent died March 20, 1993.

The Court is satisfied that the period during which § 13208 was made retroactive was not unreasonable in light of *Carlton* which also concerned an estate tax statute. *Id.*

The Court holds that the 1993 retroactive increase in tax rates does not violate the Takings Clause of the Fifth Amendment to the Constitution.

Count Six:

Violation of *Ex Post Facto* Clause under Article 1, § 9, cl. 3 of the Constitution

The Constitution prohibits Congress from enacting an *ex post facto* law. "No Bill of Attainder or Ex Post Facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. Since its decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), the Supreme Court has interpreted this prohibition as applying only to criminal enactments and as having no application to retroactive civil legislation. In asserting that § 13208 is unconstitutional as a prohibited *ex post facto* law, Plaintiff relies on *Burgess v. Salmon*, 97 U.S. 381 (1878)

in which the Court said, "To impose upon the owner of the goods a criminal punishment or a penalty" for not paying the retroactive tobacco tax increase would subject the owner to the operation of an *ex post facto* law. *Id.* at 384. Likewise, Plaintiff asserts, the Code is saturated with criminal penalties. As example, it is a criminal offense for "any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, or keep any records, or supply any information" to fail willfully "to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation . . . " 26 U.S.C. § 7203. In enacting the Code "Congress has not categorized tax fraud investigations into civil and criminal components but has created a law enforcement system in which criminal and civil elements are inherently intertwined." *United States v. La Salle Nat'l Bank*, 437 U.S. 298 (1978). Plaintiff argues that all sanctions afforded by the Code are potentially criminal in nature because the penalties are on a continuum from less to more harsh depending on the degree of delinquency. *Spies v. United States*, 317 U.S. 492, 497 (1943). In the alternative, Plaintiff asserts that the prohibition against *ex post facto* laws should apply to civil laws with retroactive provisions also because there has been substantial criticism of *Calder v. Bull*.

Plaintiff does not claim all substantive tax laws are criminal in nature, but rather that the enforcement provisions lend a potentially criminal nature to all Code sections in that the taxpayer might be criminally liable by

refusal to pay the tax imposed under any section of the Code.

Plaintiff's interpretation is untenable because it would make every retroactive tax law *ipso facto* an unconstitutional *ex post facto* law. Such an interpretation does not accord with the decisions of the Supreme Court or with the Congressional taxing power granted by the Constitution. In this case, only by proceeding in a criminal manner and refusing to pay the tax as levied would the estate be subject to criminal sanctions. That would constitute punishment for an action occurring subsequent to the enactment of § 13208. Plaintiff paid the tax on time and the Court is satisfied that the institution of this cause of action indicates in the clearest possible way that criminal refusal to pay was not a necessary precursor to Plaintiff's right to challenge the law as promulgated.

Regarding the application of the *ex post facto* prohibition to civil statutes, *Calder* is still followed and this Court is bound by its precedent. *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995); *Fern v. United States*, 15 Cl. Ct. 580, 588, *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

The Court holds that the 1993 retroactive increase in tax rates did not contravene the prohibition against *ex post facto* laws set forth in Article I, § 9, cl. 3 of the Constitution.

CONCLUSION

This Court finds that Plaintiff has failed to support the allegations contained in Counts One through Six of the complaint. For the reasons herein set forth, Plaintiff's

Motion for Partial Summary Judgment is DENIED. Defendant's Motion for Partial Summary Judgment regarding Counts One through Six of the Complaint is GRANTED.

/s/ Edward J. Damich
EDWARD J. DAMICH
Judge, U.S. Court of Federal Claims

United States Court of Appeals
for the Federal Circuit

00-5113

NATIONSBANK OF TEXAS, N.A.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

(Filed Jan. 29, 2002)

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate has already issued.

FOR THE COURT,

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: January 29, 2002

cc: Hugh Lowe
Ellen Page Delsole

NATIONSBANK OF TEXAS V US, 00-5113
(CFC – 98-CV-21)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

U. S. Constitution

ARTICLE I

Section. 2. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]

* * *

Section. 7. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the

Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Section. 9. No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

U. S. Constitution

Amendments to the Constitution of the United States of America

Amendment V.

No person shall be held to answer for a a [sic] capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment XIV.

The Fourteenth Amendment was ratified July 9, 1868.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

PUBLIC LAW 103-66 [H.R. 22640; August 10, 1993

OMNIBUS BUDGET RECONCILIATION ACT OF 1993

SEC. 13208: TOP ESTATE AND GIFT TAX RATES MADE PERMANENT.

(a) GENERAL RULE. – The table contained in paragraph (1) of section 2001(c) is amended by striking the last item and inserting the following new items:

"Over $2,500,000 but not over $5,000,000.	$1,025,500, plus 63% of the excess over $2,500,000.
Over $3,000,000 _____	$1,280,800, plus 65% of the excess over $3,000,000."

(b) CONFORMING AMENDMENTS. –

(1) Subsection (c) of section 2001 is amended by striking paragraph (2) and by redesignating paragraph (3) as paragraph (2).

(2) Paragraph (2) of section 2001(c), as redesignated by paragraph (1), is amended by striking "($18,340,000 in the case of decedents dying, and gifts made, after 1992)".

(3) The last sentence of section 2101(b) is amended by striking "section 2001(c)(3)" and inserting "section 2001(c)(2)".

(c) EFFECTIVE DATE. – The amendments made by this section shall apply in the case of decedents dying and gifts made after December 31, 1992.

OMNIBUS BUDGET RECONCILIATION ACT OF 1993

P.L. 103-66, see page 107 Stat. 312

HOUSE REPORT NO. 103-111

4. Reinstate top estate and gift tax rates at 53 percent and 65 percent (sec. 14208 of the bill and sec. 2001 of the Code)

PRESENT LAW

A Federal gift tax is imposed on transfers by gift during life and a Federal estate tax is imposed on transfers at death. The Federal estate and gift taxes are unified, so that a single graduated rate schedule is applied to an individual's cumulative gifts and bequests. For decedents dying (or gifts made) after 1992, the estate and gift tax rates begin at 18 percent on the first $10,000 of taxable transfers and reach a maximum of 50 percent on taxable transfers over $2.5 million. Previously, for the nine-year period beginning after 1983 and ending before 1993, two additional brackets applied at the top of the rate schedule: a rate of 53 percent on taxable transfers exceeding $2.5 million and below $3 million, and a maximum marginal tax rate of 55 percent on taxable transfers exceeding $3 million. The generation-skipping transfer tax is computed by reference to the maximum Federal estate tax rate (sec. 2641).

In order to phase out the benefit of the graduated brackets and unified credit, the estate and gift tax is increased by five percent on cumulative taxable transfers between $10 million and $18,340,000, for decedents dying and gifts made after 1992. (Prior to 1993, this phase out of

the graduated rates and unified credit applied to cumulative taxable transfers between $10 million and $21,040,000.)

Reasons for Change

To raise revenue to address the Federal deficit, to improve tax equity, and to make the tax system more progressive, the committee believes that the top two estate and gift tax rates which expired at the end of 1992 should be reinstated.

Form 843

(Rev. January 1994) **OMB No. 1545-0024**

Department of the Treasury **Expires 1-31-97**
Internal Revenue Service

Claim for Refund and Request for Abatement

▶ See separate instructions

Use Form 843 only if your claim involves one of the taxes shown on line 3a or a refund or abatement of interest, penalties, or additions to tax on line 4a.

Note: Do not use Form 843 if your claim is for –

- An overpayment of income taxes;
- A refund of fuel taxes; or
- An overpayment of excise taxes reported on Form 720, 730, or 2290.

Decedent's

Name of claimant Nationsbank of Texas, N.A., Independent Executor of the Estate of Ellen Clayton Garwood, Deceased

Your social security number 466 : 56 : 9773

Address (number, street, and room or suite no.)
501 Congress Avenue, 10th Floor

Spouse's social security number : :

City or town, state, and ZIP code Austin, Texas 78701

Employer identification number :

Name and address shown on return if different from above

Daytime telephone number (512) 397-2590

1. Period – prepare a separate Form 843 for each tax period Decedent's date of death 3/20/93 xxxx Amount to be refunded or abated $1,361,939.36*

3a Type of tax, penalty, or addition to tax:

[ ] Employment [x] Estate [ ] Gift
[ ] Excise (other than excise taxes reported on Form 720, 730, or 2290) [ ] Penalty IRC section ▶ _____

b Type of return filed (see instructions):

[x] 706 [ ] 709 [ ] 940[] 941 [ ] 990-PF [ ] 4720 [ ] Other (specify)

4a Request for abatement or refund of:
[ ] Interest caused by IRS errors and delays (under Rev. Proc. 87-42 – see instructions
[ ] A penalty or addition to tax as a result of erroneous advice from the IRS.

b. Dates of payment ▶

5. Explanations and additional claims. Explain why you believe this claim should be allowed, and show computation of tax refund or abatement of interest, penalty, or addition to tax.

See attached.

*plus interest, or such greater amount as is refundable.

Signature. If you are filing Form 843 to request a refund or abatement relating to a joint return, both you and your spouse must sign the claim. Claims filed by corporations must be signed by a corporate officer authorized to sign,

and the signature must be accompanied by the officer's title.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and, to the best of my knowledge and belief, it is true, correct, and complete.

Diane Post, SVP, NationsBank of Texas, N.A., Independent Executor
/s/ Diane Post 12/17/96

Director's Stamp (*Date received*)

For Paperwork Reduction Act Notice, see separate Pub. No. 10180R Form 843 (Rev. 1-94)

3/7/94 Published by Tax Management, Bureau of National Affairs, Inc.

Estate of Ellen Clayton Garwood, Deceased
Date of Death: March 20, 1993
Social Security Number: 466-56-9773

ATTACHMENT TO
FORM 843 – CLAIM FOR REFUND AND
REQUEST FOR ABATEMENT
Item 5

By this Form 843 – Claim for Refund and request for Abatement, NationsBank of Texas, N.A., Independent executor for the Estate of Ellen Clayton Garwood, Deceased (the "Estate"), is requesting a refund of federal estate taxes paid with the Estate's return filed with the IRS on December 20, 1993. Exhibit A, incorporated herein, contains the required statements regarding the authority of NationsBank of Texas, N.A. to file this Claim for Refund on behalf of the Estate and has an original Letters Testamentary and a copy of the death certificate of Ellen Clayton Garwood (the "Decedent") attached. This Claim for Refund is based on two, independent claims (which the Estate shall hereinafter refer to respectively as the "Deductions Claim" and the "Rates Claim"). These separate claims, however, are interrelated and the amount of the Claim for Refund has been independently quantified for each claim.

THE DEDUCTIONS CLAIM:

Reason for Allowance: The Deductions Claim is based on the fact that the Estate has incurred to date and will incur in the future greater executors' commissions and legal, accounting, and miscellaneous expenses during the administration of the Estate than those previously reported as deductions on the Estate's federal estate tax return (Schedule J, Part B)

filed with the IRS on December 20, 1993. Exhibit B, incorporated herein, sets forth revised attachments to Schedule J. Part B, Item 1 (Executors' Commissions), Item 2 (Attorney Fees), Item 3 (Accountant Fees), and Item 4 (Miscellaneous Expenses), showing the actual expenses incurred for each such item to date, and the estimated amount of future expenses, filed as a protective claim. The following chart summarizes and compares the updated expenses and the original estimated expenses shown on the estate tax return filed:

Expense	Updated Amounts	Original Amounts on 706
Executors' Commissions	$ 112,000.00	$ 100,000.00
Attorney Fees	156,688.94	55,000.00
Accountant Fees	15,192.75	9,500.00
Miscellaneous Expenses	48,968.81	45,558.45
Total	$ 332,850.50	$ 210,058.45

Amount of Refund Claim As a Result of Additional Deductions Claimed: **$47,888.89**

If the Deductions Claim is allowed in full but the Rates Claim is disallowed, the Estate will be entitled to a refund in the total amount of $47,888.89. This $47,888.89 amount represents the difference between the $11,121,906.63 federal estate tax paid with the Estate's federal estate tax return filed with the IRS on December 20, 1993 and the $11,074,017.74 amount of federal estate tax payable by the Estate if the Deductions Claim, but not the Rates Claim, is allowed (the calculation of this $11,074,017.74 amount is shown on Exhibit C, incorporated herein).

THE RATES CLAIM:

Reasons for Allowance: The Decedent died on March 20, 1993. On the Decedent's date of death, the highest statutory gift and estate tax rate imposed on taxable transfers was fifty percent. After the Decedent's death, Congress enacted the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, pursuant to which the statutory estate tax rate was increased. That legislation was signed into law on August 10, 1993. The effective date of the increased rate schedule was made retroactive to December 31, 1992. The Internal Revenue Service issued an Announcement that all estates of persons dying after December 31, 1992 would be subject to this increased tax rate (with the effect that the increase was applied retroactively to Decedent's estate) and that estates filing on Forms 706 using the fifty percent (50%) rate would be subject to the additional tax computed at the higher rate and interest on such additional tax. Decedent's estate tax return was filed on December 20, 1993 with the new rates applied to Decedent's taxable estate. This Claim for Refund is filed to seek redress against the invalid rate increase as it was applied to Decedent's estate.

The retroactive application of the higher tax rate to Decedent's estate is invalid as applied to Decedent's estate under the U.S. Constitution for the following reasons:

a. The retroactive increase violated the principle of separation of powers embodied in the Constitution and impermissibly intruded on the veto powers granted the President by the Constitution. President George Bush had vetoed by pocket veto the rate increase for the period which included the Decedent's date of death. The President's right to a pocket veto is a right

to absolutely veto legislation proposed by the Congress, and that absolute veto could not constitutionally be undone retroactively by the acts of a subsequent Congress and a subsequent President.

b. The retroactive application of the tax rate increase violated the apportionment provisions of the Constitution, Article 1, Section 2, and Article 1, Section 9. The application of an increased tax on gifts or on the estate of a decedent whose death occurred before enactment of the rate increase is a direct and unapportioned tax, in violation of the Constitution.

c. The retroactive application of the increased tax rate violated a U.S. citizen's right to due process, in contravention of the Due Process Clause of the Fifth Amendment of the Constitution. To impose such an increase retroactively is so harsh and offensive that it transgresses the limitations on governmental power imposed by the Constitution.

d. The retroactive application of the increased tax rate denied Decedent, her estate, and her Independent Executor equal protection under the laws as guaranteed by the Constitution. The estate and gifts of Decedent (and others who died during the period subjected to the retroactive increase) were taxed at a rate higher than the rate in effect on the Decedent's date of death; all other persons subject to the tax are taxed at the rate in effect at the date of death.

e. The application of the retroactive rate increase constituted a "taking" of Decedent's property by the government without compensation, in violation of the Takings Clause of the Fifth Amendment to the Constitution. Also,

because the increase in rate was invalid, the government's imposition of that portion of the tax attributable to the increase in rate was not a valid exercise of the government's taxing authority, and was therefore an unlawful taking.

Amount of Refund Claim As a Result of Lower Statutory Rate: **$1,320,190.07**

If the Rates Claim is allowed in full but the Deductions Claim is disallowed, the Estate will be entitled to a refund in the total amount of $1,320,190.07. This $1,320,190.07 amount represents the difference between the $11,121,906.63 in federal estate tax paid with the Estate's federal estate tax return filed with the IRS on December 20, 1993 and the $9,801,716.56 amount of federal estate tax payable by the Estate if the Rates Claim, but not the Deductions Claim, is allowed (the calculation of this $9,801,716.56 amount is shown on Exhibit D, incorporated herein).

THE DEDUCTIONS CLAIM AND THE RATES CLAIM:

Reason for Allowance: Based on the facts, law, and analysis, the Estate is entitled to claim and receive a refund based on both the Deductions Claim and the Rates Claim.

Amount of Refund Claim As a Result of Both the Deductions Claim and the Rates Claim: **$1,361,939.36**

If both the Deductions Claim and the Rates Claim are allowed, the Estate will be entitled to a refund in the total amount of $1,361,939.36. This $1,361,939.36 amount represents the difference between the $11,121,906.63 in federal estate tax paid with the Estate's federal estate tax return filed with

the IRS on December 20, 1993 and the $9,759,967.27 amount of federal estate tax payable by the Estate if both the Deductions Claim and the Rates Claim are allowed (the calculation of this $9,759,967.27 amount is shown on Exhibit E, incorporated herein).

EXHIBIT A

AFFIDAVIT

STATE OF TEXAS § KNOW ALL MEN BY
§ THESE PRESENTS:
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared Diane Post who, after being by me duly sworn, did depose and say:

"My name is Diane Post. I am Senior Vice President of NationsBank of Texas, N.A., a national banking institution, which has its principal office in Austin, Travis County, Texas. NationsBank of Texas, N.A. was appointed to serve as Independent Executor of the Estate of Ellen Clayton Garwood, Deceased on April 5, 1993, as further evidenced by the Letters Testamentary attached hereto and made a part hereof, and is still currently serving in that capacity. As Independent Executor, NationsBank of Texas, N.A. originally filed the federal estate tax return on behalf of the Estate of Allen Clayton Garwood, Deceased. On behalf of NationsBank of Texas, N.A., I hereby swear and affirm and, under penalties of perjury, I declare that I have examined this claim for refund, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete."

/s/ Diane Post
DIANE POST,
Senior Vice President of
NationsBank of Texas, N.A.

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

This instrument was acknowledged before me on the 17th day of December, 1996, by Diane Post, Senior Vice President of NationsBank of Texas, N.A., a national banking institution, on behalf of said institution, as Independent Executor of the Estate of Ellen Clayton Garwood, Deceased.

[SEAL] BELIA MARTINEZ
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires: 6-12-97

/s/ Belia S. Martinez
Notary Public, State of Texas
Printed Name: Belia S. Martinez
My Commission Expires:
6-12-97

Form 2297
(Rev. 3-82) (CG)

Department of the Treasury – Internal Revenue Service
Waiver of Statutory Notification
of Claim Disallowance

I, Diane Post
(Name, SSN or EIN)

of NationsBank of Texas, N.A.
(Number, Street, City of Town, State, ZIP Code)

Representative of the Estate of Ellen Clayton Garwood waive the requirement under Internal Revenue Code section 6532(a)(1) that a notice of claim disallowance be sent to me by certified or registered mail for the claims for credit or refund shown in column (d) below.

I understand that the filing of this waiver is irrevocable and it will begin the 2-year period for filing suite [sic] for refund of the claims disallows as if the notice of disallowance had been sent by certified or registered mail.

Claims

(a) Taxable Period Ended	(b) Kind of Tax	(c) Amount of Claim	(d) Amount of Claim Disallowed
DD: 3/20/1993	ESTATE	1,361,939	1,349,158

If you file this waiver for a joint return both you and your spouse must sign the original and duplicate of this form. Sign your name exactly as it appears on the return. If you

are acting under power of attorney for your spouse, you may sign as agent for him or her.

For an agent or attorney acting under a power of attorney, a power of attorney must be sent with this form if not previously filed.

For a partnership with excise or or [sic] employment tax liability, all partners must sign. However, one partner may sign with appropriate evidence of authorization to act for the partnership.

For a person acting in a fiduciary capacity (executor, administrator, trustee), file Form 56, Notice Concerning Fiduciary Relationship, with this form if not previously filed.

For a corporation, enter the name of the corporation followed by the signature and title of the officers authorized to sign.

Your Signature

_____ _____
(Date Signed)

Spouse's Signature If A Joint Return was Filed

_____ _____
(Date Signed)

Taxpayer's Representative Sign Here

_____ _____
(Date Signed)

Partnership/ Corporate Name	NationsBank of Texas, N.A., Independent Executor of the Estate of Ellen C. Garwood, Deceased

Partnership/ Corporate Officers Sign Here

/s/ Diane Post
By: Diane Post
Senior Vice-President (Title) — 6-20-97 (Date Signed)

_____
_____ (Title) — _____ (Date Signed)

NOTE: Filing this waiver within 6 months from the date the claim was filed will not permit filing a suit for refund before the 6-month period has elapsed unless a decision is made by the Service within that time disallowing the claim.

Form 890
(Revised Dec. 1982)

Date Received by Internal Revenue Service

Department of the Treasury – Internal Revenue Service

Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment – Estate and Gift Tax

(Please see the instructions on the second page of this form)

Part 1. Consent to Assessment and Acceptance of Overassessment

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) and accept any overassessment (decrease in tax and penalties) shown below, plus any interest provided by law. I understand that by my signing this waiver, a petition to the United States Tax Court may not be made, unless additional deficiencies are determined.

Date of Death of Period Ending 3/20/1993

Item	Increase	Decrease
Tax		12,781
Penalty		
Total		12,781

If the estate is required to file with the District Director of Internal Revenue evidence of payment of estate, inheritance, legacy, or succession taxes to any State or the District of Columbia, I understand that such evidence must be filed by , or the credits for these taxes will not be allowed. I also agree to the assessment and collection of the increase in estate tax and penalties of based on the disallowed credits, plus interest figured to the 30th day after or until this increase is assessed, whichever is earlier.

Estate of Ellen Clayton Garwood

Executor or ~~Administrator~~

Sign Here NATIONSBANK OF TEXAS, N.A.,
INDEPENDENT EXECUTOR FOR ESTATE OF ELLEN C. GARWOOD, Deceased

Address By: Diane Post S&P Date 6/20/97

Executor or Administrator	Sign Here		
	Address		Date
Donor	Name	Address	
Donor's Signature	Sign Here		Date

Part 2. Unified Credit Agreement

I agree to the increase or decrease in the total allowed Unified Credit by the amount shown below.

	Increase	Decrease	
Unified Credit			
Donor	Name		Address
Donor's Signature	Sign Here		Date

Part 3. Gift Tax Marital Deduction

I agree to the increase or decrease in the usage of the gift tax marital deduction by the amount shown below.

		Increase	Decrease
Marital Deduction			
Donor	Name		Address
Donor's Signature	Sign Here		Date

Instructions

Consent to Assessment and Acceptance of Overassessment

If you consent to the assessment of the deficiencies shown in Part 1 of the form, please sign the agreement under Part 1 and return the form to limit any interest charge and expedite the adjustment to your account. Your consent will not prevent a claim for refund from being

filed (after the tax has been paid) if you later believe it is warranted, nor prevent from later determining that additional tax is owed, nor extend the time provided by law for either action.

If a claim is later filed and the Service disallows it, a suit for refund may be filed in a Federal District Court or the United States Court of Claims, but a petition may not be filed with the United States Tax Court.

We will consider this waiver a valid claim for refund or credit of any overpayment due resulting from any decrease in tax and penalties determined by the Internal Revenue Service, shown on page one of this form, provided part 1 of this form is signed and filed within the period established by law for making such a claim.

Unified Credit Agreement

If you agree with the increase or decrease of the allowed credit shown in Part 2 of this form, please sign the agreement under Part 2 and return the form.

Marital Deduction Agreement

If you agree with the increase or decrease in the usage of the gift tax marital deduction by the amount shown in Part 3 of this form, please sign the agreement under Part 3 and return this form.

Signature Instructions

If the executor or administrator is a corporation, the waiver should be signed with the corporate name, followed by the signatures and titles of the corporate officers authorized to sign. An attorney or agent may sign

this waiver provided the attorney is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

No. 01-1584

In the Supreme Court of the United States

NATIONSBANK OF TEXAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

TERESA E. MCLAUGHLIN
ELLEN PAGE DELSOLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pgs

QUESTION PRESENTED

Whether Section 13208 of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66, 107 Stat. 469) which reinstated federal estate and gift tax rates of 53 and 55 percent, is constitutional.

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In the Supreme Court of the United States

No. 01-1584

NATIONSBANK OF TEXAS, N.A., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-17) is reported at 269 F.3d 1332. The opinion of the Court of Federal Claims (Pet. App. 19-35) is reported at 44 Fed. Cl. 661.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2001. The petition for rehearing was denied on January 29, 2002 (Pet. App. 36-37). The petition for a writ of certiorari was filed on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Ellen Clayton Garwood died on March 20, 1993. The executor of her estate—petitioner NationsBank of Texas—challenges the constitutionality of the legislation enacted in August 1993 that reinstated the federal estate tax rates of 53 and 55 percent for the estates of decedents dying on or after January 1, 1993.

a. Under the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 402, 95 Stat. 300, the highest federal estate and gift tax rates were to be reduced from 70 percent to 50 percent over a four-year period. As a consequence, the highest estate tax rates in effect in 1984 were to be 53 and 55 percent, and those rates were to fall to 50 percent after that year. The Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 21, 98 Stat. 506, delayed this decrease, however, by extending the 1984 top rates (50 and 53 percent) until 1988. The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10401(a), 101 Stat. 1330-430, then again extended these top rates until 1993. Pet. App. 3-4.

In late 1992, Congress passed a bill that would have again deferred the decrease in the top estate and gift tax rates until 1998. See H.R. Conf. Rep. No. 1034, 102d Cong., 2d Sess. 178-179 (1992). That bill was not presented to the President until a time within ten days of adjournment, however, and became subject to a pocket veto when the President thereafter declined to sign it. As a result, the top estate tax rates dropped to 50 percent on January 1, 1993. Pet. App. 4.

b. When decedent died in March 1993, the top estate tax rate was thus 50 percent. Even before decedent died, however, legislation was proposed in February 1993 to restore the top former estate tax rates of 53 and 55 percent. See *National Taxpayers Union, Inc.* v.

United States, 68 F.3d 1428, 1430 n.1 (D.C. Cir. 1995). That legislation was enacted in August 1993 and was signed into law as part of the Omnibus Budget Reconciliation Act of 1993 (OBRA), Pub. L. No. 103-66, § 13208, 107 Stat. 469. Section 13208 of that Act restored the top estate tax rates of 53 and 55 percent previously in force and made those rates effective with respect to the estates of all decedents dying on or after January 1, 1993. The estate represented by petitioner is thus subject to these tax rates. Pet. App. 4.

2. Petitioner filed a timely federal estate tax return and paid the estate taxes due on decedent's gross estate at the tax rates required by the OBRA. Petitioner thereafter filed an administrative claim for refund, contending that the reinstatement of the preexisting top rates under the OBRA effected an unconstitutional retroactive increase in taxes. Petitioner claimed a refund of $1,320,190, which was the amount by which the taxes paid at the 53 and 55 percent top rates exceeded the tax due if the 50 percent top rate applied instead. Pet. App. 20-22, 45-62.

3. The administrative refund claim was not granted, and petitioner brought this suit for refund in the Court of Federal Claims. Petitioner asserted that the retroactive rates imposed by the OBRA violated the separation of powers doctrine, the Apportionment Clause, the Ex Post Facto Clause, the Takings Clause, the Due Process Clause and the equal protection component of the Fifth Amendment. Pet. App. 22-34 The Court of Federal Claims, however, upheld the Act against all constitutional challenges. *Id.* at 19-35.

The court first rejected petitioner's argument that allowing the rate change to have retroactive effect would "undo President Bush's pocket veto in violation of the separation of powers doctrine." Pet. App. 23.

The court noted that there is no constitutional prohibition against the reintroduction and enactment of legislation that had been previously defeated or pocket vetoed. *Id.* at 24. The court also disagreed with petitioner's contention that the retroactive rate increase violated the Apportionment Clause, noting that the estate tax is a transfer tax, not a direct tax that requires apportionment. *Id.* at 26-27. The court further concluded that there was no violation of the Due Process Clause because the period of retroactivity was modest and the rate increase was neither arbitrary nor irrational. *Id.* at 28. The court rejected petitioner's contention that the rate change infringed upon the equal protection guarantee, since no "other group" received treatment more advantageous than decedent's estate. *Id.* at 29. And, given the modest period of retroactivity, the court concluded that the rate change was not "so arbitrary and capricious as to amount to confiscation" implicating the Takings Clause. *Id.* at 31. Finally, the court rejected petitioner's contention that the application of the rate increase to decedent's estate violated the Ex Post Facto Clause, for it is well established that the prohibition of that Clause applies only to criminal laws. *Id.* at 32.

4. a. The court of appeals affirmed. Pet. App. 1-13. The court first rejected petitioner's argument that the enactment of a retroactive rate change after a pocket veto violates the separation of powers doctrine. It noted that the statute "independently met the constitutional requirements for enactment, namely passage by both houses of Congress and approval by the President," and that nothing in the Constitution prohibits the enactment of legislation that has the same subject matter as legislation previously defeated or rejected by a pocket veto. *Id.* at 6. The court also rejected

petitioner's Apportionment Clause challenge, noting that the estate tax is not a direct tax, but a tax on the transfer of property at death, and that the rate increase, "even applied retroactively, does not change the character of the estate tax from a non-direct tax to a direct tax." *Id.* at 7. The court also held that the Ex Post Facto Clause is not implicated in this case because that prohibition "applies solely to criminal enactments." *Ibid.* (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798)). The court emphasized that petitioner timely paid the tax, and no "criminal penalty" is at issue in this case. *Id.* at 8. The court further concluded that the statute passes muster under the Due Process Clause because it advances the rational purpose of "treating similarly situated taxpayers similarly" by imposing "a uniform fifty-five percent rate on estate tax transfers regardless of the particular month in which they occur." *Id.* at 11. The court noted that the eight-month period of retroactivity is "modest" and that Congress acted "promptly [to fill] the temporal gap" in rates. *Ibid.* Finally, the court rejected petitioner's contention that the statute violates the equal protection guarantee. The statute "did not discriminate against any narrow class of taxpayers because it did not treat any 'other group' more advantageously." *Id.* at 12. Instead, it "promoted tax equity" (*ibid.*) by preventing decedents who died during the gap period from enjoying "more advantageous treatment" (*id.* at 13) than those dying before or afterwards.

b. Judge Plager dissented. Pet. App. 13-17. He argued that the retroactive estate tax rate increase "is simply unfair" and "should be unconstitutional." *Id.* at 13. Addressing only the Ex Post Facto Clause, Judge Plager urged that the courts should "assign *Calder v.*

Bull and its progeny to the historic dustbin where they belong." *Id.* at 16.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This Court has emphasized that "the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Recognizing that a degree of retroactivity often serves a rational legislative purpose, this Court has repeatedly rejected constitutional challenges to the retroactivity of tax legislation. *E.g.*, *United States* v. *Carlton*, 512 U.S. 26 (1994) (upholding limitation on estate tax deduction for sales of employer securities to employee stock ownership plans to estates of decedents that had owned the stock in question at death, as applied to estate that purchased and sold stock before enactment); *United States* v. *Hemme*, 476 U.S. 558 (1986) (upholding transition rule requiring reduction of unified credit by 20 percent of exemptions allowed under prior law); *United States* v. *Darusmont*, 449 U.S. 292 (1981) (per curiam) (upholding retroactive decrease in minimum tax exemption, as applied to taxpayer who would have incurred no tax liability on his capital gain under law in effect at time of sale); *Welch* v. *Henry*, 305 U.S. 134 (1938) (upholding 1935 Wisconsin statute repealing income tax exemption for dividends of corporations doing majority of business in that State, as applied to dividends received in 1933); *Milliken* v. *United States*, 283 U.S. 15, 24-25 (1931) (upholding increase in estate

tax rate for gifts in contemplation of death, as applied to preenactment gift).

Indeed, as the Court has noted, retroactivity is a common feature of tax legislation. "Congress 'almost without exception' has given general revenue statutes effective dates prior to the dates of actual enactment." *United States* v. *Carlton*, 512 U.S. at 32-33 (quoting *United States* v. *Darusmont*, 449 U.S. at 296). Such retroactive effect, "confined to short and limited periods required by the practicalities of producing national legislation," is a "customary congressional practice." *United States* v. *Carlton*, 512 U.S. at 33 (quoting *United States* v. *Darusmont*, 449 U.S. at 296-297).

Contrary to petitioner's contention (Pet. 18), there was nothing arbitrary or irrational about the decision of Congress in August 1993 to reinstate—for all estates of decedents who died *during* 1993—the top estate tax rates that prevailed *prior* to 1993. A retroactive tax statute does not violate the Due Process Clause when it has "a rational legislative purpose" and the period of retroactivity is "modest." *United States* v. *Carlton*, 512 U.S. at 30-31, 32-33. The rate reinstatement in 1993 was intended "[t]o raise revenue, to address the Federal deficit, to improve tax equity, and to make the tax system more progressive." H.R. Rep. No. 111, 103d Cong., 1st Sess. 644 (1993). These are unquestionably legitimate legislative goals. And, the statute's eight-month period of retroactivity is shorter than the fourteen-month period upheld as "modest" in *Carlton*. 512 U.S. at 32-33.

The due process claim raised by petitioner in this case has been rejected in numerous other decisions that have upheld the limited retroactive feature of this legislation. See *Quarty* v. *United States*, 170 F.3d 961, 965-969 (9th Cir. 1999); *Kane* v. *United States*, 942 F.

Supp. 233, 234 (E.D. Pa. 1996), aff'd by unpublished order, 118 F.3d 1576 (3d Cir. 1997) (Table); see also *National Taxpayers Union, Inc.* v. *United States*, 68 F.3d at 1438. There are no conflicting decisions. Review by this Court is therefore not warranted.

2. a. Since this tax legislation is consistent with due process, there is no basis for petitioner's contention (Pet. 17) that the statute violates the Takings Clause of the Constitution. See *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641 (1993). No "taking" is effected when Congress exercises its taxing power. *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 24 (1916). The rate restoration effected by this statute was reasonably designed to enhance tax equity, by subjecting the estates of decedents dying during 1993 to tax at the same rates applicable to the estates of all other decedents dying since 1984. A lawful tax does not constitute a "taking" without just compensation. *Quarty* v. *United States*, 170 F.3d at 969-970; *Kane* v. *United States*, 942 F. Supp. at 234.

b. Contrary to petitioner's contention (Pet. 23), the equal protection guarantee is not implicated by Section 13208. Equal protection is not denied unless the tax "in fact bears unequally on persons or property of the same class." *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 190 (1945). Section 13208 has the obvious purpose of ensuring equal—rather than disparate—treatment of similarly situated taxpayers. It imposes on the estates of persons who died between January and August 1993 the same estate tax rates that apply to

the estates of persons who died before 1993 and after August 1993.[1]

c. Petitioner also errs in contending (Pet. 5) that Section 13208 violates the Apportionment Clause. This Court has repeatedly held that the federal estate tax is a tax on specific transfers of property, not a direct tax on individuals that requires apportionment. See *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 355 (1988); *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945); *Tyler* v. *United States*, 281 U.S. 497, 502 (1930). In *Milliken* v. *United States*, 283 U.S. at 24, the Court rejected the precise argument made by petitioner in this case—that a retroactive increase in the rate converts an otherwise indirect tax into a direct tax. The challenge to Section 13208 under the Apportionment Clause has therefore correctly been rejected by the several courts that have addressed it. See *Quarty* v. *United States*, 170 F.3d at 970-971; *Kane* v. *United States*, 942 F. Supp. at 234; see also *National Taxpayers Union, Inc.* v. *United States*, 68 F.3d at 1438.

d. Petitioner further errs in claiming (Pet. 8) that this statute should be struck down as an unconstitutional attempt to circumvent the pocket veto of H.R. 11, 102d Cong., 1st Sess. (1991). Nothing in the Constitution prevents Congress from reenacting vetoed legislation with the same content in a new bill. *The Pocket Veto Case*, 279 U.S. 655, 679 n.6 (1929); *Kennedy*

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[1] Even a tax classification that effects different treatment of similarly-situated taxpayers must be upheld if it bears a rational relationship to a legitimate governmental interest. *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983). The limited retroactivity of Section 13208 has the rational purposes of increasing revenue to reduce the deficit and promoting tax equity. It therefore plainly meets this standard. *Quarty* v. *United States*, 170 F.3d at 967.

v. *Sampson*, 511 F.2d 430, 436 n.17 (D.C. Cir. 1974). The OBRA was not a resuscitation of H.R. 11; it was an entirely new bill (H.R. 2264, 103d Cong., 1st Sess. (1993)) that was introduced during the first session of the new 103rd Congress. The OBRA was passed by both Houses of Congress and signed by the President in 1993. It thus independently satisfied the constitutional requirements for the enactment of legislation. Pet. App. 6.

e. Finally, there is no merit to petitioner's contention (Pet. 9-16) that Section 13208 violates the constitutional prohibition against ex post facto laws. In the two centuries since the Court first addressed the Ex Post Facto Clause in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), the Court has consistently held that this Clause applies only to criminal enactments and has no bearing on retroactive civil legislation. See *Collins* v. *Youngblood*, 497 U.S. 37, 41-42 (1990); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); *Bankers' Trust Co.* v. *Blodgett*, 260 U.S. 647 (1923); *Johannessen* v. *United States*, 225 U.S. 227, 242 (1912). There is no occasion for reexamining that rule in this case, which is a civil action seeking a tax refund. While tax laws, like many other civil laws, are subject to enforcement by criminal sanctions, this case involves only a civil remedy; it is not a criminal case.[2] As noted by the majority below, "[i]f the entire tax code were criminal, every retroactive tax law would become an unconstitutional *ex post facto* enactment," a

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[2] Petitioner also ignores that willfulness is required for criminal violations involving the filing of returns and payment of tax. 26 U.S.C. 7201, 7203, 7206(1), 7207. In this case, petitioner paid the tax and sued for a refund. No criminal sanctions of any type are relevant to this civil action.

result that would plainly be at odds with the repeated recognition by this Court of the authority of Congress to enact retroactive tax legislation. Pet. App. 8; see, *e.g.*, *United States* v. *Carlton*, 512 U.S. at 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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